TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]

No. [redacted]

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE O. L. MERRICK COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF NORTH DAKOTA.

FILED MARCH 19, 1917.

(25,840)

(25,840)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 1010.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE C. L. MERRICK COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF NORTH DAKOTA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 26, 1917.

1 STATE OF NORTH DAKOTA,
County of Burleigh:

In District Court, Sixth Judicial District.

THE C. L. MERRICK COMPANY, a Corporation, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Defendant.

Summons.

The State of North Dakota to the above named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer upon the subscribers within thirty days after the service of this summons upon you, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated at Bismarck, North Dakota, this 19th day of March, A. D. 1913.

MILLER & ZUGER,
Attorneys for Plaintiff, Bismarck, North Dakota.

[Endorsed:] Filed in District Court, Burleigh County, North Dakota. May 6th, A. D. 1913. Chas. Fisher, Clerk.

2 STATE OF NORTH DAKOTA,
County of Burleigh:

In District Court, Sixth Judicial District.

THE C. L. MERRICK COMPANY, a Corporation, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Defendant.

Complaint.

Now comes the plaintiff and states the following facts for a cause of action against the defendant:

I.

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of North Dakota.

II.

That the defendant is, and at all times hereinafter mentioned, was, a railroad corporation, doing business in the state of North Dakota as a common carrier of freight and passengers.

III.

That at different times during the years 1907, 1908, 1909, and 1910, and since July 1, 1907, the defendant received for and on account of the plaintiff, at Wilton, North Dakota, a large number of car loads of coal for shipment and transportation over its railroad lines to various points in this state located on its said railroad, as hereinafter set forth; and the defendant was not lawfully authorized to charge for the transportation of said coal a greater rate per ton than the maximum coal rate prescribed in and by chapter 51 of the Session Laws of North Dakota for 1907.

IV.

That the defendant received and accepted said coal for transportation, and transported the same; and upon the arrival of said coal at its various destinations, the plaintiff demanded the same of the defendant and offered to pay it for transporting the same the
3 lawful freight rate, but the defendant refused to deliver said coal or any part thereof to plaintiff unless plaintiff would pay to the defendant an illegal and excessive charge, in each and every instance for transporting the same, and plaintiff did pay to the defendant, under protest, such excessive freight charges in each and every instance in order to obtain its said coal from the defendant, as hereinafter set forth.

V.

Plaintiff alleges that the dates, car numbers, destinations, weights of coal contained in the cars, the freight charges exacted, the lawful charges and overcharges covering the transportation of the coal by the defendant as above mentioned, are as follows, to-wit:

Dates.	Car Nos.	Destinations.	Weights.	Charges exacted.	Lawful charges.	Over charges.
Nov. 19, '08	9145	Braddock	63,900	$27.48	$16.61	$10.87
Jan. 31, '09	3596	Braddock	40,100	17.24	10.42	6.82
Sept. 10, '08	4902	Braddock	45,300	19.48	11.78	7.70
May 2, '08	8984	Braddock	43,100	18.53	11.20	7.33
Dec. 22, '08	5054	Braddock	44,700	20.11	11.62	8.49
Jan. 29, '09	1914	Napoleon	44,300	19.94	12.40	7.54
Mar. 5, '10	3297	Braddock	53,000	22.79	13.78	9.01
Jan. 28, '10	12258	Braddock	46,600	20.04	12.12	7.92

Dates.	Car Nos.	Destinations.	Weights.	Charges exacted.	Lawful charges.	Over charges.
Jan. 20, '10	3749	Braddock	51,900	22.32	13.49	8.83
Nov. 30, '09	3131	Braddock	53,300	22.92	13.86	9.06
Dec. 14, '09	16800	Braddock	54,000	23.22	14.04	9.18
Dec. 14, '09	3425	Braddock	51,200	22.02	13.32	8.70
Nov. 29, '09	3421	Napoleon	51,000	22.95	14.28	8.67
Dec. 1, '09	3749	Napoleon	49,200	22.14	13.77	8.37
Sept. 29, '09	4658	Braddock	47,600	20.46	12.37	8.09
Oct. 29, '09	3683	Braddock	55,500	23.87	14.43	9.44
Nov. 26, '09	2061	Braddock	53,800	23.13	13.99	9.14
Nov. 14, '09	3619	Braddock	49,500	21.29	12.87	8.42
Jan. 25, '09	7566	Braddock	46,200	19.87	12.02	7.85
Jan. 25, '09	2296	Braddock	45,200	19.44	11.75	7.69
4						
Nov. 18, '08	4900	Napoleon	47,700	21.47	13.36	8.11
Nov. 17, '08	9129	Napoleon	65,900	29.66	18.45	11.21
Nov. 19, '09	3932	Braddock	41,400	17.80	10.76	7.04
Nov. 3, '08	15020	Braddock	54,500	23.44	14.17	9.27
Oct. 3, '08	7582	Napoleon	46,500	20.92	13.02	7.90
Dec. 9, '07	3034	Braddock	51,500	22.15	13.39	8.76
Dec. 9, '07	3173	Napoleon	57,300	25.79	16.05	9.74
Dec. 18, '07	22636	Napoleon	48,700	21.92	13.64	8.28
Dec. 20, '07	3707	Napoleon	50,600	22.77	14.17	8.60
Dec. 21, '07	9149	Braddock	58,700	25.24	15.26	9.98
Dec. 16, '07	24640	Braddock	52,300	22.49	13.60	8.89
Dec. 16, '07	7530	Braddock	43,600	18.75	11.34	7.41
Feb. 4, '08	3375	Braddock	47,700	20.51	12.40	8.11
Feb. 29, '08	9217	Braddock	48,700	20.93	12.66	8.27
Mar. 16, '08	9117	Braddock	55,200	23.74	14.35	9.39
Sept. 23, '07	27174	Braddock	55,100	23.69	14.32	9.37
Sept. 29, '07	3011	Braddock	44,800	19.09	11.65	7.44
Nov. 27, '07	3420	Braddock	42,900	18.45	11.16	7.29
Oct. 3, '08	....	Napoleon	46,500	20.92	13.02	7.90

VI.

That on Sept. 28th, 1910, Plaintiff demanded of defendant that it refund to plaintiff the illegal and excessive freight charges, namely, $332.08, exacted from the plaintiff as above set forth, and that defendant has refused and still refuses to repay the same or any part thereof.

Wherefore, Plaintiff demands judgment against the defendant for $332.08 with interest thereon at seven per cent per annum from September 28th, 1910, together with the costs and disbursements of this action.

MILLER & ZUGER,
Attorneys for Plaintiff.

5 STATE OF NORTH DAKOTA,
County of Burleigh, ss:

Alfred Zuger, being first duly sworn, says that he is one of the attorneys for the plaintiff in the above entitled action; that he has read the foregoing complaint therein and knows the contents thereof, and that said complaint is true to the best of his knowledge, information and belief.

ALFRED ZUGER.

Subscribed and sworn to before me this 19th day of March, 1913.

[NOTARY SEAL.]

F. A. LAHR,
Notary Public in and for Said County and State.

My Commission expires Nov. 20th, 1917.

[Endorsed:] Filed in District Court, Burleigh County, North Dakota. May 6th, A. D. 1913. Chas. Fisher, Clerk.

Due and personal service by copy of the within summons & Complaint is hereby admitted this 19th day of March, 1913, at Bismarck, North Dakota.

L. K. THOMPSON,
Agent for Defendant, Bismarck, N. D. 3,35 P. M.

6 *Answer.*

STATE OF NORTH DAKOTA,
County of Burleigh:

District Court.

THE C. L. MERRICK COMPANY, a Corporation, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Defendant.

Amended Answer to the Complaint Herein.

I.

The defendant admits that during all of the times mentioned in the complaint it was, ever since has been and now is, a railroad corporation and common carrier, and that during all of said times it owned and operated a line of railroad through the station of Wilton, North Dakota, to various other stations in said state of North Dakota.

II.

The defendant further admits that between July first, 1907, and the first day of March, 1910, it transported as a common carrier some coal for the plaintiff between said station of Wilton and other stations, and also admits and alleges that it charged and collected from the plaintiff for such transportation the rates prescribed in its tariffs duly filed, posted and published as required by the laws of the State of North Dakota.

III.

Except as aforesaid defendant denies each and every allegation in said complaint contained.

IV.

For a further and separate answer to said complaint defendant alleges that chapter 51 of the laws of the State of North Dakota for the year 1907 is void for the reasons:

First, that it violates the commerce clause of the Constitution of the United States, article 1, section 8 of said constitution, which provides that "Congress shall have power to regulate commerce with foreign nations and among the several states * * *."

Second, for the reason that the maximum rate fixed by said act is unremunerative, unreasonable, inadequate and confiscatory, and violates the fourteenth amendment to the Federal Constitution, also section 13 of the state constitution.

V.

For further and separate answer to said complaint defendant alleges that after said chapter 51 was enacted this defendant and other railroad companies engaged in the transportation of coal in said State of North Dakota refused to comply with said chapter 51 on the ground that it was invalid and unconstitutional and invalid; that shortly thereafter the Attorney General of the State of North Dakota filed a petition in the Supreme Court of said state of North Dakota in a proceeding entitled State ex rel. T. F. McCue vs. Northern Pacific Railway Company, et al. in which, after setting forth the facts deemed by him to be material, he duly prayed that the Supreme Court should issue its writ of injunction to restrain the defendant and other railway companies from violating said chapter 51; that said defendant and said other railway companies appeared in said suit thus commenced by the Attorney General and made their several answers and returns in said proceeding and alleged as the reason why they should not be compelled to comply with said chapter 51 that said chapter 51 was unconstitutional and void for the same reasons stated in paragraph four of this answer; that thereafter the action so commenced by said Attorney General was duly tried in said Supreme Court of

the State of North Dakota and a decision duly rendered therein which was reported in 19 North Dakota Reports page 45, to which reported decision and proceedings the defendant begs leave to refer in this action the same as if said decision were fully pleaded and made a part of this answer; that thereafter this defendant and said other railway companies duly procured from the Supreme Court of the United States a writ of error to review said decree entered by said Supreme Court of the State of North Dakota; that thereafter said Supreme Court of the United States duly rendered its decision which
8 decision is reported in volume 216 of the United States Supreme Court reports, page 579 in which the latter Court affirmed the said decision of said state court, "but without prejudice to the right of the railway company to reopen the case by appropriate proceedings if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal;" that immediately after the latter decision was rendered, namely, in the early part of the year 1910 this defendant put in force the rates prescribed by said chapter 51 of the laws of North Dakota and for a year thereafter charged and collected the rates prescribed by said chapter 51 for all coal transported by it in said state of North Dakota and thus made an adequate trial of the rates prescribed by said chapter 51 as suggested and directed by the decision of the United States Supreme Court before referred to; that on or about the first day of July, 1911, this defendant, having satisfied itself after an adequate trial of the rates prescribed by said chapter 51 as aforesaid, that such rates were confiscatory, and that the confiscatory character of such rates could be established by the additional testimony which the defendant could offer based upon the actual trial of said rates as aforesaid, duly applied to the Supreme Court of the State of North Dakota for leave to reopen the said case of state of North Dakota ex rel. against said railway company and others and an order was thereupon duly entered by said Supreme Court of the State of North Dakota in said original case reopening said case and appointing a referee for the taking of additional testimony therein.

That voluminous testimony was thereafter taken by said referee and duly returned to said Supreme Court of the State of North Dakota and thereafter a retrial was duly had in said Supreme Court of the State of North Dakota of said original case and the latter court thereafter duly made its seperate findings of fact and conclusions of law and entered judgment commanding the defendant and other carriers to keep the rates prescribed by said chapter 51 in force. That the decision last referred to embodying such findings of fact,
9 conclusions of law and directing judgment was fully reported under the title of State ex rel. McCue vs. Northern Pacific Railway Company et al. 26 North Dakota reports, beginning page 428. The defendant begs leave to refer to the proceedings last mentioned and to the decision rendered by the State Supreme Court last referred to, the same as if said proceedings and decision were fully pleaded and made a part of this answer.

That thereafter this defendant duly procured from the Supreme Court of the United States a writ of error to review the judgment en-

tered by said Supreme Court of the State of North Dakota last mentioned; that subsequently after a full and due presentation of the matter, the Supreme Court of the United States duly rendered its decision and made its mandate which decision and mandate is reported in volume 236 U. S. Supreme Court reports beginning page 585 and ending on page 605, to which decision and proceedings had in said Supreme Court of the United States last referred to the defendant begs leave to refer the same as if said decision and proceedings were fully pleaded and made a part of this answer. That thereafter, to-wit: on the 11th day of June, 1915, pursuant to the mandate of the Supreme Court of the United States last referred to a final judgment was duly entered in the Supreme Court of the State of North Dakota in said original action entitled as aforesaid. That the judgment so entered, among other things, duly adjudg- and decreed as follows:

"1. That the judgment of this Court in this cause be and such judgment is hereby reversed and set aside.

2. That this action be and the same is hereby dismissed.

3. That the defendant, Minneapolis, St. Paul & Sault Ste. Marie Railway Company recover against the plaintiff, its costs herein in the Supreme Court of the United States, to-wit: $42.90, and its costs in this court which are taxed and allowed at $—.

It is further adjudged and decreed that the Clerk enter this judgment and decree nunc pro tunc as of June 5th, 1915."

Defendant alleges that during all of the times mentioned herein the plaintiff was and now is a citizen and resident of the State of North Dakota; that the original action and proceedings referred to herein was brought in the name of the State of North Dakota and on behalf of all of the people, citizens and residents of the State of North Dakota. That the final decision and mandate of the Supreme Court of the United States reported in volume 236 of the United States Supreme Court reports beginning page 585 as aforesaid, and the final judgment entered by the Supreme Court of the State of North Dakota on the 11th day of June, 1915, aforesaid, pursuant to said mandate of said Supreme Court of the United States is binding upon said plaintiff and upon all other citizens and residents of said State of North Dakota; that by reason thereof said plaintiff is fully and effectually barred from collecting from this defendant the alleged excess freight charges sought to be collected in this action.

VI.

And defendant alleges, as a further defense, that section 142 of the constitution of North Dakota is the sole authority for the legislative establishment of regulation of rates to be charged by common carriers in said state, and that the final clause of said section 142, which is in the following words: "But the rates fixed by the legislative assembly or board of railroad commissioners, shall remain in force pending the decision of the Courts" as applied to the present case is void and inoperative because it is repugnant to and violates the fourteenth amendment to the constitution of the United States.

Wherefore, Defendant prays that this action be dismissed; that all further proceedings herein be enjoined and for such other and further relief as to the Court may seem just and equitable, under the circumstances, and for its costs and disbursements herein.

JOHN L. ERDALL,
First National-Soo Line Bldg., Minneapolis, Minnesota.

NEWTON, DULLAM & YOUNG,
Bismarck, North Dakota.

PALDA, AAKER & GREENE,
Minot, North Dakota.

A. H. BRIGHT,
Of counsel.

11 STATE OF NORTH DAKOTA,
County of Burleigh, ss:

G. F. Dullam, being first duly sworn, deposes and says: that he is one of the attorneys for the defendant, the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, and makes this verification on behalf of said company; that he has read the foregoing Amended Answer and knows the contents thereof, and says that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

G. F. DULLAM.

Subscribed and sworn to before me this 28th day of July, A. D. 1915.

[NOTARY SEAL.] J. A. GRAHAM,
Notary Public, Burleigh County, North Dakota.

Commission Expires Dec. 18-1915.

[Endorsed:] Filed in open Court this 19th day of Aug., 1916. Chas. Fisher, Clerk.

Due and personal service of the within answer by copy is hereby admitted this 28th day of July 1915, at Bismarck, North Dakota.

MILLER, ZUGER & TILLOTSON,
Attorneys for Plaintiff.

12 *Findings of Fact.*

STATE OF NORTH DAKOTA,
County of Burleigh:

In District Court, Sixth Judicial District.

THE C. L. MERRICK COMPANY, a Corporation, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Defendant.

The court makes and files the following findings of fact:

1. That during all of the times mentioned in the complaint the plaintiff was a corporation duly organized under the laws of the State of North Dakota and a citizen and resident of that State.

2. That during all of the times mentioned in the complaint the defendant was a railroad corporation duly organized under the laws of the State of Minnesota and during all of said times was engaged as a common carrier of freight and passengers in said State of North Dakota.

3. That between the first day of July 1907 and the first day of March 1910 the defendant received from and transported for the plaintiff a considerable number car loads of coal within the state of North Dakota; that the defendant charged and collected therefor the rates duly prescribed by its tariffs which rates so charged and collected exceeded in the aggregate the rates prescribed by chapter 51 of the laws of North Dakota for the year 1907, by the sum of Three Hundred Thirty-two and 08/100 Dollars ($332.08).

4. That the defendant refused to deliver said coal or any part thereof unless the plaintiff would pay said tariff rates and plaintiff paid the same under protest.

5. That before the commencement of this action plaintiff demanded of defendant that it refund to the plaintiff all rates charged and collected on such coal shipments in excess of the rates prescribed by said chapter 51, but defendant refused to repay the same or any part thereof.

13 6. That on or about the 7th day of August 1907 the Attorney General of North Dakota, on behalf of and in the name of the State of North Dakota, commenced an action in the Supreme Court of that State against the defendant. In his petition the Attorney General pleaded in substance that chapter 51 of the laws of 1907 had been duly enacted and that it was and had been in force ever since the first day of July 1907; that defendant refused to comply with it and was charging rates in excess of the rates prescribed by it; that the defendant was violating said law and threatened to continue to violate the same; that the entire people and all citizens

of the state were vitally interested in the rates charged for the transportation of coal.

The Petition prayed for an injunction enjoining the defendant from violating said law.

The defendant made answer to this petition and pleaded, among other things, that said chapter 51 was void for the reason that it violated the fourteenth amendment to the Federal Constitution.

7. That on the 22nd day of May 1909, after a hearing was duly had in said action, the Supreme Court of the State of North Dakota made and entered its judgment in favor of the State and against the defendant wherein it was ordered and adjudged, among other things, as follows:

"That said act, to-wit: chapter 51 of the laws of 1907 is valid and constitutional; that the petitioner is entitled to the relief asked, and further that a writ issue herein requiring the defendant to put in force the rates prescribed by said act."

8. That on the application of the defendant a writ of error was duly issued out of the Supreme Court of the United States to review the judgment of the state court last referred to. The decision of the United States Supreme Court was filed on March 14th 1910 and is reported in volume 216 of the United States reports, page 579. The mandate of the United States Supreme Court to the State
14 Court, among other things, provided as follows:

"It is now hereby ordered and adjudged by this court that the judgment of the state supreme court in this cause be, and the same hereby is, affirmed with costs, but without prejudice to the right of the railway company to reopen the case by appropriate proceedings if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

9. That on the 13th day of September 1910 pursuant to the mandate of the Supreme Court of the United States the state Supreme Court entered a judgment in said action, which, among other things, provided as follows:

"It is hereby ordered and adjudged that the judgment heretofore rendered and entered by this court be and the same is hereby affirmed, but with the modification that such affirmance is without prejudice to the right of the railway company to reopen the case by appropriate proceedings, if after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

10. That on the 3rd day of July 1911 pursuant to said mandate of the United States Supreme Court and said judgment of the State Supreme Court last referred to, the defendant filed its petition to reopen said case and to take further testimony showing the confiscatory character of the rates for coal. The Supreme Court of the state thereupon granted said petition. Thereafter further testimony was taken and after having duly considered the same the supreme court of the state made and filed its further opinion embodying findings of fact and conclusions of law which are reported in volume 26 of the North Dakota Reports, page 438. Judgment was entered in accordance with said findings in said state supreme court on the 2nd day of February 1914 adjudging that "The writ of injunction here-

tofore issued herein requiring and commanding the defendant to put and keep in force the rates prescribed by the Act, is hereby made permanent and in all things affirmed."

11. That thereafter upon the application of the defendant a writ was again duly issued out of the Supreme Court of the United States to review the judgment last mentioned. The decision of the United States Supreme Court was filed on or about the 8th day of March 1915, and is reported in volume 236 United States Reports, page 535, whereby the judgment of the Supreme Court of February 2nd, 1914, was reversed; that on the 9th day of April 1915 the Supreme Court of the United States issued its mandate to the State Supreme Court in accordance with the opinion last referred to.

12. That thereafter on the 9th day of July 1915 the Supreme Court of the State pursuant to the mandate last referred to entered its final judgment in said action between the state and the defendant adjudging and decreeing, among other things:

"1. That the judgment of this court in this cause be and such judgment is hereby reversed and set aside.

2. That this action be and the same is hereby dismissed.

3. That the defendant, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, recover against the plaintiff the State of North Dakota, its costs herein in the Supreme Court of the United States, to-wit: $42.90 and its costs in this court which are taxed and allowed at —.

It is further adjudged and decreed that the clerk enter this judgment and decree nunc pro tunc now as of June 15th, 1915."

13. That there was no substantial change in the railroad of the defendant located in the state of North Dakota between the first day of July 1907 and the first day of July 1911; that there was no substantial change of the lignite coal mines tributary to the line of the defendant in North Dakota during the time last mentioned. All lignite coal handled intr-state by the defendant during this period came from the same mines. That there was no substantial difference in the cost of handling the intrastate lignite coal traffic on the line of the defendant during this period; that the conditions under which said traffic was handled on the line of the defendant during this period were substantially the same; the only material difference being that the tonnage gradually increased from Eighty-Seven Thousand Two Hundred Sixteen (87,216) tons in 1907 to Two Hundred Five Thousand Thirty-Eight (205,038) tons for the year ending June 30th 1911; that the Railroad connections between this defendant and other Railway Companies, so far as *it* related to the handing of intrastate lignite coal, were the same during this entire period and such traffic was handled as between the carriers in the same way and under the same conditions.

Conclusions of Law.

The Court makes and files the following conclusions of law:

1. That chapter 51 of the laws of North Dakota, was from the date of its enactment in conflict with the fourteenth amendment to

the Federal Constitution, and hence unconstitutional and invalid ab initio.

2. That the action brought in the name and on behalf of the state by the Attorney General referred to in the findings of fact was brought on behalf of all the citizens of the State; that the proceedings in said suit in the name and on behalf of the state constituted one action in which there was only one final judgment, namely, the judgment entered as of the 5th day of June 1915; that the proper construction and necessary effect of the judgment last referred to was to finally determine that said chapter 51 as applied to this defendant was unconstitutional from the date of its enactment and that the plaintiff was and is conclusively bound thereby.

3. That section 142 of the Constitution of North Dakota, if it applies to the present case is void and inoperative because it is repugnant to and violates the fourteenth Amendment to the
17 Constitution of the United States.

4. That judgment be entered herein dismissing the action of the plaintiff and for costs and disbursements in favor of the defendant.

It is therefore ordered that judgment be entered herein in favor of the defendant in accordance with the foregoing Findings of Fact and Conclusions of Law.

Dated this 8th day of Dec. A. D., 1915.

By the Court,

W. C. CRAWFORD, *Judge.*

Filed in the office of the Clerk of the District Court, Burleigh County, North Dakota, this 18 day of Dec. A. D. 1915. Chas. Fisher, Clerk, by L. H. Langley, Deputy.

[Endorsed:] Due and personal service of the within proposed findings of fact, conclusions of law and order for judgment by copy thereof is hereby admitted this 27th day of November 1915, at Bismarck, North Dakota. Miller, Zuger & Tillotson, Attorneys for Plaintiff.

18 *Judgment.*

STATE OF NORTH DAKOTA,
County of Burleigh:

In District Court, Sixth Judicial District.

THE C. L. MERRICK COMPANY, a Corporation, Plaintiff,

v.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Defendant.

The above entitled action having been regularly brought on for trial before Hon. W. C. Crawford, Judge of the Tenth Judicial Dis-

trict of the State of North Dakota, sitting at the written request of Hon. W. L. Nuessle, Judge of the Sixth Judicial District of the State of North Dakota, on the 19th day of August, 1915, at the chamber of this Court at the court house in the City of Bismarck, Burleigh County, North Dakota, the plaintiff appeared by its attorneys, Messrs. Miller & Zuger, and the defendant appeared by its attorneys, Mr. John L. Erdall of Minneapolis, Minnesota, Messrs. Palda, Aaker & Greene of Minot, North Dakota, Messrs. Newton, Dullam & Young of Bismarck, North Dakota and Mr. William G. Porter of Aberdeen, South Dakota, and the Court having heard the allegations and proofs of the parties, and the argument of counsel, and, after due deliberation, having duly made its findings of facts, conclusions of law and order for judgment herein, in favor of the defendant and against the plaintiff, dismissing said action upon its merits, and awarding costs and disbursements in favor of the defendant, which findings of fact, conclusions of law and order for judgment are on file herein;

Now, On motion of John L. Erdall, Palda, Aaker & Greene, Newton, Dullam & Young and William G. Porter, attorneys for the defendant, and in obedience to said order for judgment it is

Adjudged and determined, that said complaint and action be, and the same are, hereby dismissed upon their merits with prejudice, and

It is further adjudged and determined, That the defend-
19 ant, The Minneapolis, St. Paul & Sault Ste. Marie Railway Company, do *do* have and recover of and from the C. L. Merrick Company, the plaintiff herein, the costs and disbursements herein taxed and allowed in the sum of $57.40.

Witness, The Hon. W. C. Crawford, Judge of the Tenth Judicial District of the State of North Dakota, sitting at the written request of the Hon. W. L. Nuessle, Judge of the Sixth Judicial Dsitrict of the State of North Dakota, and my hand and the seal of said Court this 18th day of December, 1915.

[Seal of the District Court.]

CHAS. FISHER, *Clerk.*

[Endorsed:] Filed in the office of the Clerk of the District Court, Burleigh County, North Dakota, this 18 day of Dec. A. D. 1915. Chas. Fisher, Clerk, by L. H. Langley, Deputy.

20 *Notice of Entry of Judgment.*

STATE OF NORTH DAKOTA,
County of Burleigh:

In District Court, Sixth Judicial District.

THE C. L. MERRICK COMPANY, a Corporation, Plaintiff,

v.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Defendant.

To the C. L. Merrick Company, a Corporation, and to Messrs. Miller, & Zuger, its Attorneys:

Please take notice, That on the 18th day of December, 1915, judgment was entered in the above entitled action dismissing the same with prejudice and for the costs and disbursements of the defendant in said action taxed and allowed at the sum of $57.40; that a copy of said judgment is hereto attached and herewith served upon you.

Dated at Bismarck, North Dakota, December 18, 1915.

JOHN L. ERDALL,
PALDA, AAKER & GREENE,
NEWTON, DULLAM & YOUNG &
WM. G. PORTER,
Attorneys for Defendant.

Service of the foregoing notice of entry of judgment with copy of such judgment, by copies thereof received, is hereby admitted this 18" day of December, 1915, at Bismarck, North Dakota.

MILLER, ZUGER & TILLOTSON,
By ANDREW MILLER,
Attorneys for Plaintiff.

Filed in the office of the Clerk of the District Court, Burleigh County, North Dakota, this 21 day of Dec. A. D. 1915. Chas. Fisher, Clerk, by L. H. Langley, Deputy.

21 *Notice of Appeal to Supreme Court.*

STATE OF NORTH DAKOTA,
County of Burleigh:

In District Court, Sixth Judicial District.

THE C. L. MERRICK COMPANY, a Corporation, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Defendant.

To John L. Erdall, Palda, Aaker & Greene, Newton, Dullam & Young, and William G. Porter, Attorneys for the Above-named Defendant, and to Chas. Fisher, Clerk of said District Court:

Please take notice, That the above named plaintiff, The C. L. Merrick Company, a corporation, appeals to the Supreme Court of the State of North Dakota, from the judgment of the said District Court entered herein on the 18th day of December, A. D., 1915, dismissing plaintiff's action and complaint and awarding the defendant the sum of $57.40 as costs and disbursements herein, and from the whole thereof; and herewith serves upon you a statement of the errors of law it complains of.

Dated this 1st day of February, A. D., 1916.

MILLER, ZUGER & TILLOTSON,
Attorneys for Plaintiff, Bismarck, N. D.

[Endorsed:] Filed in District Court, Burleigh County, North Dakota, Feb'y 7th A. D. 1916. Chas. Fisher, Clerk.

22 *Specifications of Error.*

STATE OF NORTH DAKOTA,
County of Burleigh:

In District Court, Sixth Judicial District.

THE C. L. MERRICK COMPANY, a Corporation, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Defendant.

1.

The court erred in making its first conclusion of law and in holding that Chapter 51 of the laws of North Dakota for 1907, as applied to the defendant herein, was from the date of its enactment in

conflict with the fourteenth Amendment to the Federal Constitution, and hence unconstitutional and invalid ab initio.

2.

The court erred in making its second conclusion of law. The court erred in deciding that the action brought by the attorney general, referred to in the finding of fact, and the proceedings in that suit in the name and on behalf of the state constituted one action in which there was only one final judgment, namely, the judgment entered nunc pro tunc as of the 5th day of June, 1915; and in holding that the proper construction and necessary effect of the judgment last referred to was to finally determine that said chapter 51 as applied to this defendant was unconstitutional from the date of its enactment and that the plaintiff was and is conclusively bound thereby.

3.

The court erred in making its third conclusion of law, in holding that section 142 of the Constitution of North Dakota, if it applies to the present case, is void and inoperative because it is repugnant to and violates the fourteenth Amendment to the Constitution of the United States.

23

4.

The court erred in making its fourth conclusion of law that judgment be entered herein dismissing the action of the plaintiff and for costs and disbursements in favor of the defendant.

5.

The court erred in ordering judgment in favor of the defendant and against plaintiff upon the findings of fact and conclusions of law herein.

6.

The court erred in rendering and entering judgment in favor of the defendant and against the plaintiff.

7.

Upon the findings of fact herein the plaintiff was and is entitled to judgment for the relief demanded in the complaint.

8.

Upon the findings of fact herein the defendant was not, nor is it, entitled to a judgment for a dismissal of plaintiff's complaint and action, nor for its costs.

MILLER, ZUGER & TILLOTSON,
Attorneys for the Defendant and Appellant,
Bismarck, North Dakota.

[Endorsed:] Filed in District Court, Burleigh County, North Dakota, Feb'y 7th A. D. 1916. Chas. Fisher, Clerk.

24 *Undertaking on Appeal.*

STATE OF NORTH DAKOTA,
County of Burleigh:

In District Court, Sixth Judicial District.

THE C. L. MERRICK COMPANY, a Corporation, Plaintiff and Appellant,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Defendant and Respondent.

Whereas, on the 18th day of December, 1915, in the District Court within and for the County of Burleigh, the above named respondent recovered a judgment against the above named Appellant for a dismissal of the plaintiff's action and Fifty-seven and 40/100ths Dollars ($57.40), costs and disbursements.

And the above named appellant feeling ag-rieved thereby, intends to appeal therefrom to the Supreme Court of the State of North Dakota;

Now, therefore, we do hereby undertake that the said appellant will pay all costs and damages which may be awarded against it on said appeal or a dismissal thereof, not exceeding Two Hundred and fifty Dollars; and do also undertake that if the said judgment so appealed from, or if any part thereof, be affirmed, or said appeal be dismissed, the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against said appellant on said appeal.

Dated February 1st, 1916.

THE C. L. MERRICK COMPANY,
A Corporation,
By MILLER, ZUGER & TILLOTSON,
Its Attorneys of Record.
C. B. LITTLE.
J. L. BELL.

25 STATE OF NORTH DAKOTA,
County of Burleigh, ss:

On this 1st day of February, A. D. 1916, before me, B. F. Tillotson, a Notary Public in and for said County and State, personally appeared C. B. Littel and J. L. Bell known to me to be the persons

described in and who executed the foregoing instrument, and acknowledged to me that they executed the same.

[NOTARY SEAL.] B. F. TILLOTSON,
Notary Public, Burleigh County, N. D.

My Commission expires March 19, 1920.

STATE OF NORTH DAKOTA,
County of Burleigh, ss:

C. B. Littel and J. L. Bell being duly sworn, say, each for himself, that he is one of the sureties above named, that he is a resident and freeholder of the State of North Dakota, and worth the amount of Two Hundred Fifty Dollars over and above his debts and liabilities in property within this State not exempt by law from execution.

C. B. LITTLE.
J. L. BELL.

Subscribed and sworn to before me this 1st day of February, 1916.

[NOTARY SEAL.] B. F. TILLOTSON,
Notary Public, Burleigh County, N. D.

My Commission expires March 19, 1920.

STATE OF NORTH DAKOTA,
County of Burleigh, ss:

On this 1st day of February, 1916, before me, B. F. Tillotson, a notary public in and for said County and State, personally appeared Alfred Zuger, known to me to be a member of the firm of Miller, Zuger & Tillotson, who are described in and whose names are subscribed to the within instrument as attorneys of record of The C. L. Merrick Company, a corporation, and acknowledged to me that he subscribed the name of said The C. L. Merrick Company
26 thereto as principal and the names of Miller, Zuger & Tillotson as attorneys of record in said action.

[NOTARY SEAL.] B. F. TILLOTSON,
Notary Public, Burleigh County, N. D.

My Commission expires March 19, 1920.

The within and foregoing bond and the sufficiency of the Sureties thereon are hereby approved this 7th day of February, 1916.

[Seal of the District Court.]

CHAS. FISHER, *Clerk.*

27 [Endorsed:] Due and personal service by copy of the within Notice, Specifications of Error and Undertaking is hereby admitted this 7th day of February, 1916, at Bismarck, North

Dakota. John L. Erdall, Newton, Dullam & Young, Attorneys for Defendant & Respondent.

Filed in District Court, Burleigh County, North Dakota, Feb'y 7th, A. D. 1916. Chas. Fisher, Clerk.

28 *Certificate.*

STATE OF NORTH DAKOTA,
County of Burleigh:

In District Court, Sixth Judicial District.

THE C. L. MERRICK COMPANY, a Corporation, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Defendant.

STATE OF NORTH DAKOTA,
County of Burleigh, ss:

I, W. C. Crawford, Judge of the District Court and the Judge before whom the above entitled action was tried, do hereby certify that the attached papers, namely the summons and complaint, amended answer to the complaint, verified on July 28th, 1915, findings of fact, conclusions of law and order for judgment, copy of judgment and notice of entry of judgment, are contained in, and constitute the judgment roll in the above entitled action, and the foregoing papers, together with the notice of appeal to the Supreme Court and specifications of error and undertaking on appeal to the Supreme Court, are and constitute the record on appeal to the Supreme Court and the whole thereof, and the Clerk of the District Court is hereby ordered to transmit the same to the Clerk of the Supreme Court, pursuant to the appeal herein.

Dated Feb. 8th, 1916.

W. C. CRAWFORD,
Judge of the Tenth Judicial District, Acting for and at the Written Request of Hon. W. L. Nuessle, Judge of the District Court of Burleigh County, Disqualified.

[Endorsed:] Filed in District Court, Burleigh County, North Dakota, Feb'y 11th, A. D. 1916. Chas. Fisher, Clerk.

29 *Certificate.*

STATE OF NORTH DAKOTA,
County of Burleigh:

In District Court, Sixth Judicial District.

THE C. L. MERRICK COMPANY, a Corporation, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation Defendant.

STATE OF NORTH DAKOTA,
County of Burleigh, ss:

I, Charles Fisher, Clerk of the District Court within and for the County of Burleigh, Sixth Judicial District, North Dakota, do hereby certify that the above and foregoing papers are the original notice of appeal with specifications thereto attached, with proof of service thereof, and the undertaking given thereon, and also the original judgment roll in said action, consisting of the summons and complaint, amended answer, verified on July 28th, 1915, the findings of fact, conclusions of law and order for judgment and notice of entry of judgment, together with the certificate of the Judge of the District Court thereto appended, in the above entitled action, as the same now remain of record in this court and the same are transmitted to the Supreme Court pursuant to said appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court on this 11th day of February, A. D. 1916.

[Seal of the District Court.]

CHAS. FISHER,
Clerk of the District Court.

30 File No. 3124.

STATE OF NORTH DAKOTA,
In the Supreme Court, ss:

THE C. L. MERRICK COMPANY, a Corporation, Plaintiff and Appellant,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Defendant and Respondent.

Appeal from the District Court of Burleigh County.

This action coming on to be heard at the June A. D. 1916 term of this Court at the Supreme Court room, in the City of Bismarck, State of North Dakota;

Present; Charles J. Fisk, Chief Justice; Edward T. Burke, Evan B. Goss, Andrew A. Bruce and A. M. Christianson, Associate Justices, and the appeal herein having been argued by Miller, Zuger & Tillotson for the appellant and by John E. Green and John L. Erdall for the Respondent and the Court having advised thereon, it is now here considered, ordered and adjudged that the judgment of said Court within and for said Burleigh County appealed from herein, be and the same is hereby Reversed and judgment directed to be entered in favor of the plaintiff for the amount prayed for in its complaint.

And it is further ordered, that this case be and it is hereby remanded to the District Court for further proceedings according to law, and the order of this Court.

And it is further considered and adjudged, that appellant have and recover of the Respondent costs and disbursements on this appeal expended, to be taxed and allowed in the District Court.

Dated November 17th, 1916.

By the Court.

C. J. FISK,
Chief Justice.

[Seal of the Supreme Court of North Dakota.]

R. D. HOSKINS, *Clerk.*

[Endorsed:] Filed in District Court this 12th day of Dec. 1916. Chas. Fisher, Clerk.

31 STATE OF NORTH DAKOTA,
In the Supreme Court, ss:

I, R. D. Hoskins, Clerk of the Supreme Court, within and for the State of North Dakota, do hereby certify that the above and foregoing is a full, true, correct and complete copy of the order of the Supreme Court of the State of North Dakota, in the above entitled action, and the same is transmitted to the District Court in and for the County of Burleigh, State of North Dakota, as the Remittitur herein.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 11th day of December, A. D., 1916.

[Seal of the Supreme Court of North Dakota.]

R. D. HOSKINS, *Clerk.*

Fees, Clerk of Supreme Court, taxed and allowed at $12.55.

32 In Supreme Court, State of North Dakota, June, Term, 1916.

THE C. L. MERRICK COMPANY, a Corporation, Plaintiff and Appellant,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Defendant and Respondent.

1. Action to recover from a common carrier a sum alleged to have been unlawfully exacted by it from plaintiff in excess of the legal rate for transporting lignite *coal* between July 1, 1907 and March 5, 1910. The rate exacted was concededly in excess of the rate prescribed by Chapter 51 Laws 1907, but defendant and respondent railway company seek to justify the retention of such excess charge because of the decision of the Federal Supreme Court in Northern Pac. R. Co. vs. North Dakota, 236 U. S. 585, 59 L. Ed. 735, wherein it was adjudged that such statutory rates were confiscatory and void as applied to the facts therein considered. But when that case was before this Court it upheld such rate statute—(See 19 N. D. 45)—and its decision was affirmed on writ of error (See 216 U. S. 579, 54 L. Ed. 624 30 Sup. Ct. Rep. 423) with the proviso, however, that it should be "without prejudice to the right of the Railway Company to reopen the case by appropriate proceedings, if, after adequate trial it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

Held, that such prior decisions are as to the defendant railway company res judicata upon the issues there determined as to the confiscatory or non-confiscatory character of the rates as applied to the facts therein considered, and such decisions are in no way affected by the later decisions of the Supreme Court of the United States above cited, which involved only issues arising out of new facts subsequently occurring. (See 236 U. S. 585, 59 L. Ed. 735.)

It is accordingly held that the rates exacted by defendant were in excess of the legal rates in force during the period in controversy and plaintiff is entiteld to recover such excess with interest.

33 (Syllabus by the Court.)

Appeal from District Court, Burleigh County; W. C. Crawford, J. From a judgment in defendant's favor, plaintiff appeals.

Reversed and Judgment Directed for Plaintiff.

Miller, Zuger & Tillotson, Bismarck, for Appellant.

John L. Erdall, Minneapolis, Minn., John E. Green, Minot, N. D., G. F. Dullam, Bismarck, N. D., Wm. G. Porter, S. D., (A. H. Bright, of Minneapolis, Minn., of Counsel), for Respondent.

34 C. L. Merrick Co. vs. Mpls., St. Paul & S. S. M. Ry. Co.

FISK, *C. J.*:

Plaintiff seeks to recover a sum alleged to have been wrongfully exacted from it in excess of the legal rate for hauling lignite coal between July 1, 1907 and March 5, 1910.

Defendant had judgment in the lower court and plaintiff appeals. The facts are not in dispute and, as found by the trial court, as follows, omitting the first two findings relating to the *d*orporate capacity of the parties:

(3) "That between the first day of July 1907, and the first day of March, 1910, the defendant received and transported for th- plaintiff a *c*onsiderable number of carloads of coal within the state of North Dakota; that the defendant charged and collected therefor the rates duly prescribed by its tariffs which rates so charged and collected exceeded in the aggregate the rates prescribed by Chaper 51 of the Laws of North Dakota for the year 1907, by the sum of three hundred thirty-two and 08/100 dollars ($332.08).

(4) That the defendant refused to deliver said coal or any part thereof unless the plaintiff would pay said tariff rates and plaintiff paid the same under protest.

(5) That before the commencement of this action plaintiff demanded of defendant that it refund to the plaintiff all rates charged and collected on such coal shipments in excess of the rates prescribed by said chapter 51, but defendant refused to pay the same or any part thereof.

(6) That on or about the 7th day of August, 1907, the Attorney General of North Dakota, on behalf of and in the name of the State of North Dakota, commenced an action in the Supreme Court of that State against the defendant. In his petition the Attorney General pleaded in substance that chapter 51, of the laws of 1907, had been duly enacted and that it was and had been in force ever since the first day of July, 1907; that defendant refused to comply with it and was charging rates in excess of the rates prescribed by it; that the defendant was violating said law and threatened to continue to violate the same; that the entire people and all citizens of the state were vitally interested in the rates charged for the transportation of coal. The petition prayed for an injunction enjoining the defendant from violating said law.

The defendant made answer to this petition and pleaded, among other things, that said chapter 51, was void for the reason that it violated the 14th amendment to the Federal Constitution.

(7) That on the 22nd day of May, 1909, after a hearing was duly had in said action, the Supreme Court of the State of North Dakota made and entered its judgment in favor of the state and against the defendant wherein it was ordered and adjudged, among other things, as follows:

"That said act, to-wit: Chapter 51 of the laws of 1907, is valid and constitution*q*l; that the petitioner is entitled to the relief asked, and further that a writ issue herein requiring the defendant to put in force the rates prescribed by said act."

(8) That on the application of the defendant a writ of error was duly issued out of the Supreme Court of the United States to review the judgment of the state court last referred to. The decision of the United States Supreme Court was filed on March 14, 1910, and is report- in volume 216, of the United States Reports, p. 579. The

mandate of the United States Supreme Court to the state court, among other things, provided as follows:

"It is now hereby ordered and adjudged by this court that the judgment of the state Supreme Court in this cause be, and the same hereby is, affirmed with costs, but without prejudice to the right of the railway company to reopen the case by appropriate proceedings, if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

(9) That on the 13th day of September, 1910, pursuant to the mandate of the Supreme Court of the United States the state Supreme Court entered a judgment in said action which, among other things, provided as follows:

"It is hereby ordered and adjudged that the judgment heretofore rendered and entered by this Court be and the same is hereby
36 affirmed, but with the modification that such affirmance is without prejudice to the right of the Railway Company to reopen the case by appropriate proceedings, if after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

(10) That on the 3rd day of July, 1911, pursuant to said mandate of the United States Supreme Court and said judgment of the state Supreme Court last referred to, the defendant filed its petition to reopen said case and to take further testimony showing the confiscatory character of the rates for coal. The Supreme Court of the State thereupon granted said petition. Thereafter further testimony was taken and after having duly considered the same the Supreme Court of the State made and filed its further opinion embodying findings of fact and conclusions of law which are reported in volume 26, of the North Dakota Reports, p. 438. Judgment was entered in accordance with said findings in said state Supreme Court on the 2nd day of February, 1914, adj*dg*ging that, "The writ of injunction heretofore issued herein requiring and commanding the defendant to put and keep in force the rates prescribed by the act, is hereby made permanent and in all things affirmed."

(11) That thereafter upon the application of the defendant a writ was again duly issued out of the Supreme Court of the United States to review the judgment last mentioned. The decision of the United States Supreme Court was filed on or about the 8th day of March, 1915, and is reported in volume 236, United States Reports, p. 535, whereby the judgment of the state Supreme Court of February 2nd, 1914, was reversed; that on the 9th day of April, 1915, the Supreme Court of the United States issued its mandate to the state Supreme Court in accordance with the opinion last referred to.

(12) That thereafter on the 9th day of July, 1915, the Supreme Court of the state pursuant to the mandate last referred to entered its final judgment in said action between the state and the defendant adjudging and decreeing, among other things:

37 "1. That the judgment of this court in this cause be and such judgment is hereby reversed and set aside.

2. That this action be and the same is hereby dismissed.

3. That the defendant, Minneapolis, St. Paul & Sault Ste. Marie

Railway Company, recover against the plaintiff, the State of North Dakota, its costs herein in the Supreme Court of the United States, to-wit: $42.90 and its costs in this Court which are taxed and allowed at $—."

It is further adjudged and decreed that the clerk enter this judgment and decree nunc pro tunc now as of June 15th, 1915."

13. That there was no substantial change in the railroad of the defendant located in the state of North Dakota between the first day of July, 1907, and the first day of July, 1911; that there was no substantial change in the lignite coal mines tributary to the line of the defendant in North Dakota during the time last mentioned. All lignite coal handled intrastate by the defendant during this period came from the same mines. That there was no substantial difference in the costs of handling the intrastate lignite coal traffic on the line of the defendant during this period; that the conditions under which such traffic was handled on the lines of the defendant during this period were substantially the same; the only material difference being that the tonnage gradually increased from eighty seven thousand two hundred sixteen (87,216) tons in 1907 to two hundred five thousand thirty eight (205,038) tons in the year ending June 30th, 1911; that the railroad connections between this defendant and other railway companies, so far as it related to the handling of intrastate lignite coal, were the same during this entire period and such traffic as between the carriers in the same way and under the same conditions."

The assignments of error challenge the correctness of the conclusions of law, which are as follows:

38 "1. That chapter 51, of the laws of North Dakota, as applied to the defendant herein, was from the date of its enactment in conflict with the fourteenth amendment of the Federal Constitution, and hence unconstitutional and invalid ab initio.

2. That the action brought in the name and on behalf of the state by the Attorney General referred to in the findings of fact was brought on behalf of all the citizens of the state; that the proceedings in said suit in the name and on behalf of the state constituted one action in which there was only one final judgment, namely, the judgment entered as of the 5th day of June, 1915; that the proper construction and necessary effect of the judgment last referred to was to finally determine that said chapter 51, as applied to this defendant was unconstitutional from the date of its enactment and that the plaintiff was and is conclusively bound thereby.

3. That section 142, of the Constitution of North Dakota, if it applies to the present case is void and inoperative because it is repugnant to and violates said fourteenth amendment to the constitution of the United States.

4. That judgment be entered herein dismissing the action of the plaintiff and for costs and disbursements in favor of the defendant.

5. It is therefore ordered that judgment be entered herein in favor of the defendant in accordance with the foregoing findings of fact and conclusions of law."

Appellant contends, in brief, that the decisive question on this ap-

peal is not whether the rate fixed by chapter 51, laws 1907, were or were not confiscatory during the period cover- by this complaint, but on the contrary, whether the rate exacted by the defendant from the plaintiff was in excess of the legal rate at that time. Respondent concedes that if the rates prescribed by chapter 51, were law-
39 ful and enfore-able as applied to the defendant during the time involved, the plaintiff is entitled to recover, otherwise not. It is therefore apparent that the controversy arises out of a difference of opinion of the legal effect on the rights of these parties of the prior litigation in the case of State ex rel. the Attorney General vs. this defendant, were the rates prescribed by chapter 51 laws 1907, in the light of such prior litigation, legally enforceable during the time here in question?

As disclosed by the findings in the case at bar, this court at the first hearing in such prior case adjudged such statutory rate reasonable and not violative of the fourteenth Amendment of the Federal Constitution, and ordered its writ to issue commanding the defendant to put the rate in force. (See 19 N. D. 43.) Such judgment was on March 14, 1910, in all things confirmed by the Supreme Court of the United States. (See 216 U. S. 579) but with the following qualifications: "but without prejudice to the right of the railway company to reopen the case by appropriate proceedings, if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

Thereupon and pursuant to the mandates of this and the Supreme Court of the United States defendant put into effect the rate prescribed by chapter 51 and continued them in force for the period of over one year when it applied to this Court for leave to reopen the case pursuant to permission thus granted it *be* the Supreme Court of the United States. The case was accordingly reopened and proof offered tending to show the confiscatory character of such rate during the fiscal year immediately prior to the reopening of such case. Upon such proof this Court again adjudged such rate to be *racs*inable, but upon writ of error to the court of last resort, it was held that such rates were confiscatory as to the defendant company and the judgment of this court was reversed. It is now contended by the respondent, and the learned trial court, in effect, held, that the plaintiff by such last decision is precluded from a recovery upon the alleged ground that the last decision of the United States Supreme
40 Court, in effect declared chapter 51 unconstitutional and void from the date of its passage, and that such last decision reversed and set aside the prior decisions of this court and of the United States Supreme Court.

If this contention is sound, it inevitably follows that both this and the Supreme Court of the United States by their first mandates forced defendant to put into effect unlawful and confiscatory rates during the period from March 14, 1910 to March 8, 1915.

We are clear that such contention is unsound. The first decision was final insofar as it put the statute into effect. In other words, it is res judicata as to the matters therein determined, and the last decision merely adjudicates that such statutory rates are confiscatory

as applied to the facts shown to exist during the period between March 14, 1910, and July 3rd, 1911.

The fallacy in respondent's contention as we view it, lies in the unwarranted assumption that the latter judgment relates back and supersedes the first. When respondent applied for and was granted leave to make a new showing as to the confiscatory character of the statutory rates, it amounted in legal effect to the commencement of a new action to determine a new issue, to-wit: whether as applied to and in the light of facts subsequently arising, such statutory rates are confiscatory. The case was not reopened for the purpose of relitigating the issues formerly decided, nor was the former decree in any way affected. This is made clear by the recent decision of the Supreme Court in the State of Missouri vs. Chicago, etc. R. R. Co. 240 U. S. —, (U. S. Adv. O. P. S. 1915 p. 715.) wherein that Court very lucidly explains the meaning of the words "without prejudice" as used by it to qualify its affirmance of the first decree. We quote: "* * * in the rate case where an assertion of confiscation was not upheld, because of the weakness of the facts supporting it, the practice came to be that the decree rejecting the claim and giving effect to the statute was, where it was deemed the situation justified it, qualified as "without prejudice," not to leave open the controversy as to the period with which the decree dealt, and which it concluded,

but in order not to prejudice rights of property in the future,
41 if, from future operations and changed conditions arising in such future, it resulted that there was confiscation. And the same limitation arising from a solicitude not to unduly restrain in the future the operation of the law came to be applied where the asserted confiscation was held to be established. In other words, the decree enjoining the enforcement of the statute in that case was also qualified as without prejudice to the enforcement of the statute in the future if a change in conditions arose. The doctrine in the first aspect nowhere finds a more lucid statement than the one made on behalf of the court by Mr. Justice Moody in Knoxville vs. Knoxville Water Co. 212 U. S. 1 53 L. ed., 371, 29 Sup. Ct. Rep. 148. It has since been repeatedly applied in language which, in the completest way, makes the meaning of the limitation "without prejudice" in such a case clear, and leaves no ground for any dispute whatever on the subject. Willcox vs. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L. R. A. (N. S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep 434; Louisville v. Cumberland Teleph. & Teleg. Co. 225 U. S. 430, 56 L. ed. 1151, 32 Sup. Ct. Rep. 741; Missouri rate cases (Knot v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 57 L. ed. 1571, 33 Sup. Ct. Rep. 975; Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 59 L. ed. 1244, P. U. R. 1915D, 577, 35 Sup. Ct. Rep. 811. A complete illustration of the operation of the qualification is afforded by the North Dakota case, just cited, since in that case, as a result of the qualification "without prejudice," the case was subsequently reopened, and upon a consideration of new conditions arising in such future period, a different result followed from that which had been previously reached. 236

Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1. As to the second aspect, that is, the significance of the limitation "without prejudice" as applied to a decree which enjoined the rates as confiscatory, the meaning of the reservation as we have stated it was in express terms, through an abundance of precaution, defined and stated in the opinion in the Missouri Rate Cases (Knot. v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 508, 57 L. ed. 1571, 1594, 33 Sup. Ct.
42 Rep. 975.

Let us test the merit of the respective contentions by these propositions.

(*a*) It is insisted that the right obtains to assert, as against the individual suit of the state, the existence of the confiscation for the very period covered by the previous finding that there was a failure to establish the confiscation, because the reservation "without prejudice," which was made in that decree, leaves the whole subject open for a renewed attack as to individuals, and, indeed, by general complaint as to the unconstitutionality of the law as a whole. But this proposition simply disregards the foundation upon which such a reservation came to be applied, as we have just pointed out, in cases involving an assault upon the present and future operation of a law fixing rates. In other words, the contention but accepts the doctrine previously announced, and yet repudiates the cases by which that doctrine was established, by affixing a meaning to the reservation "without prejudice," as used in the cases, wholly destructive of the sole object and purpose for which, in those cases, the reservation came to be applied. Again, it is said, conceding that the limitation "without prejudice," when applied to a rate case, under the authorities, has a significance which we have affixed to it, that meaning should only prevent the reopening of the inquiry as to the period embraced by the testimony in the case, and therefore should not be extended so as to prevent the reopening from the time, at least, of the close of the testimony. This, it is said, must be the case, since there might well be a change in the conditions between the time when the proof in the case was taken and the entry of the final decree. But this conention again disregards the doctrine upon which, as we have pointed out, the reservation in rate-making cases came to be applied. In other words, it treats the reservation "without prejudice" as looking backward, and overthrowing that which was concluded by the decree, instead of considering it in its true light, that is, as looking forward to the future, and providing for conditions which might then arise."

The above opinion was handed down since the oral argu-
43 ments in the case at bar, and respondent has recently filed a supplementary brief in which it attempts to distinguish the case at bar from the above case. We have, however, carefully considered the argument advanced in such supplementary brief, and we are constrained to the view that the Federal Supreme Court's opinion is in point and decision of the case at bar.

We cannot, indeed, believe with counsel for the respondent that the eminent Chief Justice, who wrote that opinion and who sought

to explain the meaning of the term "without prejudice" as used both in the case before him and the North Dakota case, spoke inadvisedly and without a clear recollection of the facts and the state of the record.

We must, indeed, remember that section 142 of the Constitution of North Dakota provides that "the legislative assembly shall have the power to enact laws regulating and controlling the rates of charges —; provided that an appeal may be had to the courts of this state from the rates so fixed; but the rates fixed by the legislative assembly or board of railroad commissioners shall remain in force pending the decision of the courts."

The legislature has spoken and fixed the rates. An appeal was taken to the Supreme Court of North Dakota and those rates were approved. On the writ of error to the Supreme Court of the United States, the judgment of the state court was upheld, the constitutionality of the rate statute was not questioned nor passed upon, nor was the validity under the Federal Constitution of section 142 of the Constitution of the State of North Dakota even questioned, and it goes without saying that the Supreme Court of North Dakota cannot question the validity of its own Constitution. The judgment of the Supreme Court of the United States was, it is true, "without prejudice," but in the meantime the rates fixed by the legislature had been approved and were certainly prima facie valid.

The opinion of the Supreme Court of North Dakota in the first case was filed on April 16, 1909 and the decision of the Supreme Court of the United States was filed on March 4, 1910. In the suit at bar plaintiff seeks to recover for over-charges up to that time, that is to say on shipments made from July 1st, 1907 to March 5,
44 1910. In the subsequent and second case, which was started under the permission to reopen, evidence to coal hauled, and to expenses of operation incurred from June 30, 1910, to June 30, 1911. None of the coal now under consideration was hauled during the period covered by the evidence in the second trial and embraced in the second decision of the Supreme Court of the United States.

Now, then, can it be said that that court held the statute to be void from its inception and that the rates prescribed by the North Dakota Legislature was confiscatory from July 1st, 1907 to March 5, 1910.

In the light of these views it follows that the judgment must be reversed and judgment entered for the plaintiff, for the sum prayed for in its complaint. It is so ordered.

C. J. FISK.
A. A. BRUCE.
A. M. CHRISTIANSON.
E. B. GOSS.
EDWARD T. BURKE.

45 File No. 3123.

STATE OF NORTH DAKOTA,
In the Supreme Court:

THE C. L. MERRICK COMPANY, a Corporation, Plaintiff and Appellant,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Defendant and Respondent.

Appeal from the District Court of Burleigh County.

I, R. D. Hoskins, Clerk of the Supreme Court, within and for the State of North Dakota, do hereby certify that the above and foregoing is a full, true, correct and complete copy of the opinion of the Supreme Court of the State of North Dakota, in the above entitled action, as the same now remains on file in said Court.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 11th day of December A. D. 1916.

[Seal of the Supreme Court of North Dakota.]

R. D. HOSKINS, *Clerk.*

[Endorsed:] Filed in Court this 12th day of Dec. 1916. Chas. Fisher, Clerk.

46 *Order for Judgment.*

STATE OF NORTH DAKOTA,
County of Burleigh:

In District Court, Sixth Judicial District.

THE C. L. MERRICK COMPANY, a Corporation, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Defendant.

Whereas this action was brought by the plaintiff against the defendant to recover $332.08 and interest thereon at the rate of seven per cent per annum from September 28th, 1910, as and for overcharges for hauling coal, and

Whereas, this court rendered and entered its decision and judgment on December 18th, 1915, in favor of the defendant and against the plaintiff as follows:

"It is adjudged and determined, that said complaint and action be

and the same are, hereby dismissed upon the*re* merits with prejudice, and

It is further adjudged and determined, that the defendant, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, do have and recover of and from The C. L. Merrick Company, the plaintiff herein, the costs and disbursements herein taxed and allowed in the sum of $57.40."

And whereas, Plaintiff duly appealed to the Supreme Court of the State of North Dakota from said decision and judgment, and such proceedings were thereupon had that the Supreme Court of the State of North Dakota did, on November 17th, 1916, order and adjudge that the said judgment of the District Court of Burleigh County appealed from herein, be and the same is hereby reversed and judgment directed to be entered in favor of the plaintiff for the amount prayed for in its complaint, and the Supreme Court further considered and *and* adjudged that the plaintiff have and recover of the defendant its costs and disbursements on said appeal ex-
47 pended, to be taxed and allowed in the District Court, and

Whereas, the Supreme Court further ordered that thi cause be and it is remanded to the District Court for further proceedings according to law, and the order of the Supreme Court aforesaid, and the Remittitur from the Supreme Court having been duly filed in this Court,

Therefore, in accordance with the order and judgment of the Supreme Court of the State of North Dakota and on motion of Messrs. Miller, Zuger & Tillotson, attorneys for the plaintiff,

It is now, ordered and considered, by this Court that plaintiff have and recover a judgment against the defendant for $332.08 and interest thereon at seven per cent per annum from September 28th, 1910, the amount prayed for in its complaint, together with plaintiff's costs and disbursements on the appeal to the Supreme Court and its costs and disbursements in this Court, to be taxed and allowed by the Clerk; and the Clerk of this Court is ordered to enter judgment accordingly.

By the Court:

W. C. CRAWFORD,
Judge of the District Court of the 10th Judicial District, Acting for Hon. W. L. Nuessle, Judge of the 6th Judicial District, Disqualified.

Dated December 14th, 1916.

[Endorsed:] Filed in District Court, Burleigh County, North Dakota. Dec. 16th, A. D. 1916. Chas. Fisher, Clerk.

48 *Judgment.*

STATE OF NORTH DAKOTA,
County of Burleigh:

In District Court, Sixth Judicial District.

THE C. L. MERRICK COMPANY, a Corporation, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Defendant.

Whereas, this action was brought by the plaintiff against the defendant to recover $332.08 and interest thereon at the rate of seven per cent per annum from September 28th, 1910, as and for overcharges for hauling coal, and

Whereas, this court rendered and entered its decision and judgment on December 18th, 1915, in favor of the defendant and against the plaintiff as follows:

"It is adjudged and determined, that said complaint and action be, and the same are, hereby dismissed upon their merits with prejudice, and

It is further adjudged and determined, that the defendant, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, do have and recover of and from The C. L. Merrick Company, the plaintiff herein, the costs and disbursements herein, taxed and allowed in the sum of $57.40."

And whereas, the plaintiff duly appealed to the Supreme Court of the State of North Dakota from said decision and judgment, and such proceedings were thereupon had that the Supreme Court of the State of North Dakota did, on November 17th, 1916, order and adjudge the said judgment of the District Court of Burleigh County appealed from herein, be and the same is hereby reversed and judgment directed to be entered in favor of plaintiff for the amount prayed for in its complaint, and the Supreme Court further considered and adjudged that plaintiff have and recover of the defendant its costs and disbursements on said appeal expended, to be taxed and allowed in the District Court, and

49 Whereas, the Supreme Court further ordered that this cause be and it is remanded to the District Court for further proceedings according to law, and the order of the Supreme Court aforesaid, and the Remittitur from the Supreme Court having been duly filed in this Court;

And this Court having, in accordance with the decision and order aforesaid of the Supreme Court of the State of North Dakota, made its order for judgment in favor of the plaintiff and against the defendant;

It is now, on motion of plaintiff's Attorneys, Messrs. Miller, Zuger

& Tillotson, and in accordance with said order of this Court, adjudged and considered, by the court, that the plaintiff have and recover judgment against the defendant for $332.08, and interest thereon at the rate of seven per cent per annum from September 28th, 1910, amounting to $141.33, and the costs and disbursements on appeal to the Supreme Court and in this Court amounting to $97.05, making a total judgment in favor of the plaintiff and against the defendant of $573.46.

Witness, the Honorable W. C. Crawford, Judge of the District Court in and for the Tenth Judicial District of the State of North Dakota, acting for Hon. W. L. Nuessle, Judge of the 6th Judicial District, disqualified, and my hand and the seal of said Court on this 16th day of December, 1916.

[Seal of the District Court.]

CHAS. FISHER, *Clerk.*

[Endorsed:] Filed in District Court, Burleigh County, North Dakota. Dec. 16th, A. D. 1916. Chas. Fisher, Clerk.

30 *Notice of Entry of Judgment.*

STATE OF NORTH DAKOTA,
County of Burleigh:

In District Court, Sixth Judicial District.

THE C. L. MERRICK COMPANY, a Corporation, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Defendant.

To the above named Defendant and to Messrs. Newton, Dullam & Young, Attorneys for Defendant:

Please take notice, that on the 16th day of December, 1916, Judgment was entered in the above entitled action in favor of the Plaintiff and against the Defendant for the sum of $476.41, principal and interest, and for plaintiff's costs and disbursements in said action taxed and allowed in the sum of $97.05, making a total judgment in favor of the plaintiff and against the defendant of $573.46.

Dated this 16th day of December, 1916.

MILLER, ZUGER & TILLOTSON,
Attorneys for Plaintiff, Bismarck, N. D.

[Endorsed:] Filed in District Court, Burleigh County, North Dakota. Dec. 16th, A. D. 1916. Chas. Fisher, Clerk.

51 *Affidavit of Service.*

STATE OF NORTH DAKOTA,
County of Burleigh:

In District Court, Sixth Judicial District.

THE C. L. MERRICK COMPANY, a Corporation, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Defendant.

STATE OF NORTH DAKOTA,
County of Burleigh, ss:

Alfred Zuger, being first duly sworn according to law deposes and says: that he now is and ever since the commencement of this action has been, one of the attorneys for the plaintiff in the above entitled action.

That at Bismarck, in said county and state, on the 16th day of December, 1916, affiant personally served the attached order for judgment, judgment, statement of costs and disbursements, duly verified, memorandum of costs and disbursements taxed by the clerk, notice of retaxation of costs and notice of entry of judgment, in the above entitled action, upon Messrs. Newton, Dullam & Young, attorneys for the defendant, by handing to and leaving with G. F. Dullam, Esq., a member of said firm of Newton, Dullam & Young, at the office of said law firm in the city of Bismarck, in said county and state, true and correct copies of each of the aforesaid papers and documents, to-wit: said Judgment, Order for Judgment, Statement of Costs and Disbursements, duly verified, Memorandum of Costs and Disbursements Taxed by the Clerk, Notice of Retaxation of Costs and Notice of Entry of Judgment.

ALFRED ZUGER.

Subscribed and sworn to before me this 16th day of December, 1916.

[NOTARY SEAL.] B. F. TILLOTSON,
Notary Public, Burleigh County, N. D.

My Commission expires Mar. 19, 1920.

[Endorsed:] Filed in District Court, Burleigh County, North Dakota. Dec. 16th, A. D. 1916. Chas. Fisher, Clerk.

51½ STATE OF NORTH DAKOTA,
County of Burleigh, ss:

Office of Clerk of District Court.

I, Chas. Fisher, Clerk of the District Court within and for the County of Burleigh and State of North Dakota, do hereby certify that the papers hereto attached are correct copies of the original Summons & Complaint with Proof of Service thereon, Answer with Proof of Service thereon, Findings of Fact, Conclusions of Law & Order for Judgment with Proof of Service thereon, Judgment and Notice of Entry of Judgment; Notice of Appeal to Supreme Court, Specifications of Error, Undertaking on Appeal with proof of Service thereof; Certificate of the Judge, Certificate of the Clerk, Remittitur from Supreme Court, Certified Copy of the Opinion of the Supreme Court, Order for Judgment, Judgment, Notice of Entry of Judgment and Affidavit of Service, in an action wherein The C. L. Merrick Company, a corporation was Plaintiff and Minneapolis St. Paul & Sault Ste. Marie Railway Company, a corporation was Defendant, as the same remain on file and of record in my office.

Witness My hand and the seal of said Court at Bismarck, N. D. This 13th day of February, A. D. 1917.

[Seal District Court, Sixth Judicial District, Burleigh County, North Dakota.]

CHAS. FISHER, *Clerk.*

52 (Original.)

In the Supreme Court of the State of North Dakota.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Plaintiff in *Error*,

vs.

THE C. L. MERRICK COMPANY, Defendant in *Error*.

To the Honorable Justices of the Supreme Court of the State of North Dakota:

Your petitioner, the above named Minneapolis, St. Paul & Sault Ste. Marie Railway Company, respectfully shows that this action was brought by the defendant in error to recover the difference between the statutory rates on coal provided in Chapter 51 of the laws of North Dakota for the year 1907, and the rates collected by plaintiff in error pursuant to its tariffs duly filed and posted. The right of action is necessarily predicated upon said Chapter 51. That said cause was commenced in the District Court of the 6th judicial district of North Dakota, and thereafter judgment was rendered by

said District Court in favor of your petitioner; that thereafter the defendant in error duly appealed to the supreme court of the State of North Dakota from the judgment last mentioned and such proceedings were thereafter had that said last named court rendered its decision therein reversing said judgment of said District Court and directing said District Court to enter a judgment in favor of the defendant in error for the full amount alleged to be due the defendant in error in the complaint herein. That thereafter and
53 pursuant to the direction and mandate of said Supreme Court of North Dakota, said District Court did, on the 16th day of December, 1916, duly cause to be entered against your petitioner a final judgment for the full amount prayed for in the complaint, as will appear by reference to the record and proceedings in said case, and that said judgment last mentioned is a final judgment between the parties hereto, and the judgment of the highest court of law or equity in said state in which a decision in the said suit could be had; that by the said suit there was drawn in question the validity of a statute of, or authority exercised under, said state, on the ground of their being repugnant to the constitution, or the laws of the United States, and the decision was in favor of their validity, all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore the said Minneapolis, St. Paul & Sault Ste. Marie Railway Company prays that a writ of error may be issued to said District Court of the Sixth Judicial District (the latter court, according to the practice and laws of the state of North Dakota, being the court in which said final judgment is entered and which court now has custody of all the records in said suit.) for the correcting of the error complained of, and that a duly authenticated transcript of the record, proceedings and papers therein may be sent to the Supreme Court of the United States.

Dated this 10th day of February, 1917.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
By JOHN L. ERDALL, *Its Attorney.*

54 & 55 STATE OF MINNESOTA,
County of Hennepin, ss:

John L. Erdall, being first duly sworn on oath says that he is the General Attorney for the Petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof and that the same is true to the best of affiant's knowledge and belief.

JOHN L. ERDALL.

Subscribed and sworn to before me this 10th day of February, 1917.

[Notarial Seal, Hennepin Co., Minn.]

ALFRED O. BJORKLUND,
Notary Public, Hennepin County, Minnesota.

My Commission expires November 17, 1922.

56 In the Supreme Court of the State of North Dakota.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY, COMPANY,
Plaintiff in Error,

vs.

THE C. L. MERRICK COMPANY, Defendant in Error.

Order Allowing Writ of Error.

Now comes the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, plaintiff in error above named, on this 13 day of February, 1917 and files and presents to this court its petition praying for the allowance of a writ of error intended to be urged by it, and praying further that the duly authenticated transcript of the record, proceedings and papers, upon which the judgmeat herein was rendered, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this court, desiring to give the petitioner an opportunity to test in the Supreme Court of the United States the questions herein presented.

It is ordered by this court that the writ of error be allowed as prayed, provided, however, that the said plaintiff in error give bond according to law in the sum of $1,000.00, which bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand this 13 day of February, 1917.

ANDREW A. BRUCE,
Chief Justice of the Supreme Court
of the State of North Dakota.

Attest:

[Seal Supreme Court, State of North Dakota.]

R. D. HOSKINS, *Clerk.*
By J. H. NEWTON, *Deputy.*

57 [Endorsed:] Personal Service of the Petition for the Writ, Order Allowing the Writ and the Writ, and Assignment of Errors, by copies thereof received is hereby Admitted at Bismarck, North Dakota, this 14th day of February, A. D. 1917. Miller & Zuger, Attorneys for The C. L. Merrick Company, Defendant in Error.

Filed in District Court, Burleigh County, North Dakota. Feb. 14th, A. D. 1917. Chas. Fisher, Clerk.

58 In the Supreme Court of the United States.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Plaintiff in Error,

vs.

THE C. L. MERRICK COMPANY, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable District Court of the Sixth Judicial District of the State of North Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the Supreme Court of the State of North Dakota, being the highest court of law or equity of said state in which a decision could be had in the said suit between the C. L. Merrick Company, defendant in error, and the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Plaintiff in error, wherein was drawn in question the validity of a statute of, or authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity, a manifest error hath happened to the said Minneapolis, St. Paul & Sault Ste. Marie Railway Company, as by their complaint appears.

And because in accordance with the practice and laws of said state of North Dakota all the records in said suit have been duly remitted to said District Court of the Sixth Judicial District and are
59 now in its custody, and pursuant to the directions and mandate of said Supreme Court of the state of North Dakota, final judgment has been entered therein against the plaintiff in error, said judgment last mentioned being the final judgment of the highest court of law or equity of said state in which a decision could be had in such suit, we being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf do command you, the said District Court of said Sixth Judicial District, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within Thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 13" day of February, A. D. 1917.

Done in the City of Fargo, District of North Dakota, with the seal of the District Court of the United States for the District of North Dakota, attached.

[Seal United States District Court, North Dakota.]

J. A. MONTGOMERY,
Clerk of the District Court of the United States for the District of North Dakota.
By E. R. STEELE, *Deputy.*

Allowed by:

ANDREW A. BRUCE,
Chief Justice of the Supreme Court of the State of North Dakota.

60 [Endorsed:] Filed in District Court, Burleigh County, North Dakota. Feb. 14th, A. D. 1917. Chas. Fisher, Clerk.

61 Supreme Court of the United States.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Plaintiff in Error,

vs.

THE C. L. MERRICK COMPANY, Defendant in Error.

Assignment of Errors.

Now comes the above named plaintiff in error and files with its petition for a writ of error, and for the purpose of having the same reviewed in the Supreme Court of the United States, its assignment of errors as follows:

1. The Supreme Court of North Dakota erred in reversing the judgment in favor of the plaintiff in error entered in the District Court of the Sixth Judicial District of North Dakota.

2. The Supreme Court of North Dakota erred in ordering final judgment to be entered in this proceeding in favor of the defendant in error and against the plaintiff in error.

3. The Supreme Court of North Dakota erred in deciding and adjudging that defendant in error was entitled to recover from the plaintiff in error the difference between the statutory rates on coal (provided in Chapter fifty-one of the laws of North Dakota for the year 1907) and the rates collected by the plaintiff in error pursuant to its tariffs; and in deciding and adjudging that said Chapter fifty-one did not deprive plaintiff in error of its property without
62 due process of law in violation of Section 1, Article 14 of the Constitution of the United States.

4. The Supreme Court of North Dakota erred in refusing to hold that the maximum rates prescribed by said Chapter fifty-one were confiscatory and therefore unconstitutional and void because repug-

nant to Section 1 of Article 14 of the Constitution of the United States.

5. The Supreme Court of North Dakota erred in deciding and adjudging that Section 142 of the Constitution of North Dakota (which provides: "The rate fixed by the Legislative Assembly or Board of Railroad Commissioners shall remain in force pending the decision of the courts.") was not repugnant to Section 1 of Article 14 of the Constitution of the United States.

Wherefore, for this and other manifest errors appearing in the record, the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, plaintiff in error, prays that the judgment of said Supreme Court of North Dakota against the plaintiff in error be reversed and set aside and held for naught, and that judgment be rendered for plaintiff in error, granting to it its rights under the Constitution of the United States, and plaintiff in error also prays for judgment for its costs.

JOHN L. ERDALL,
Attorneys for Plaintiff in Error.

63 [Endorsed:] Filed in District Court, Burleigh County, North Dakota, Feb. 14th, A. D. 1917. Chas. Fisher, Clerk.

64 STATE OF NORTH DAKOTA,
County of Burleigh:

In the District Court, Sixth Judicial District.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE C. L. MERRICK COMPANY, Defendant in Error.

I, Clerk of the said District Court, do hereby certify that there was lodged with me as such clerk on the 14th day of February, 1917, in the matter of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, plaintiff in error, against the C. L. Merrick Company, Defendant in error:

1. The agreement between the parties waiving the giving of any bond for costs or supersedeas, such agreement to have the same effect as if a bond had been duly filed, as required by the Supreme Court of North Dakota.

2. Copies of the writ of error, as herein set forth—one for the defendant in error and one to file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in the city of Bismarck, this 14th day of February, 1917.

[Seal District Court, Sixth Judicial District. Burleigh County, North Dakota.]

CHAS. FISHER,
Clerk of the District Court, 6th Judicial District, for the State of North Dakota, County of Burleigh.

65 [Endorsed:] Filed in District Court, Burleigh County, North Dakota. Feb. 14th A. D. 1917. Chas. Fisher, Clerk.

66 In the Supreme Court of the United States.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Plaintiff in Error,

vs.

THE C. L. MERRICK COMPANY, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the C. L. Merrick Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within Thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the District Court of the 6th Judicial District, County of Burleigh, State of North Dakota, wherein the Minneapolis, St. Paul & Sault Ste. Marie Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Chief Justice of the Supreme Court of North Dakota this 14th day of February, A. D. 1917.

ANDREW A. BRUCE,
Chief Justice of the Supreme Court of North Dakota.

Attest:

[Seal Supreme Court, State of North Dakota.]

R. D. HOSKINS, *Clerk,*
By J. H. NEWTON, *Deputy.*

67 Personal Service of the within and foregoing citation is hereby admitted this 14th day of February, A. D. 1917.

THE C. L. MERRICK COMPANY,
By MILLER & ZUGER, *Its Attorneys.*

68 [Endorsed:] Filed in District Court, Burleigh County, North Dakota, Feb. 14th A. D. 1917. Chas. Fisher, Clerk.

69 Supreme Court of the United States.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Plaintiff in Error,

vs.

THE C. L. MERRICK COMPANY, Defendant in Error.

It is agreed between the parties to the above entitled action by their respective attorneys that the following portion of the records of the district court of the sixth judicial district may be eliminated from the transcript of the record to be returned by the clerk of said state district court pursuant to the writ of error commanding him to transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause, for the reason that such portion of the record so omitted is not necessary to the consideration of any question to be reviewed by said Supreme Court of the United States, namely:

1. Taxation of defendant's costs and disbursements in the original trial in said state district court.
2. Notice of retaxation of such costs and retaxation thereof.
3. Statement of appellant's costs and disbursements after remittiture from the Supreme Court of the state.
4. Notice of taxation of such costs.
5. Objection to certain of such costs.
6. Reduction of costs by the clerk of said state district court on such taxation.

Dated this 9 day of February, 1917.

JOHN L. ERDALL &
NEWTON, DULLAM & YOUNG,
Attorney- for Plaintiff in Error.
MILLER & ZUGER,
Attorney- for Defendant in Error.

[Endorsed:] Filed in District Court, Burleigh County, North Dakota, Feb. 14th A. D. 1917. Chas. Fisher, Clerk.

70 Supreme Court of the United States.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Plaintiff in Error,

vs.

THE C. L. MERRICK COMPANY, Defendant in Error.

It is agreed between the parties to the above entitled action, through their respective attorneys, that the giving of a cost bond and the giving of a supersedeas bond on the appeal of said action to the Supreme Court of the United States as required by the order of the supreme court of the state of North Dakota allowing the writ of error in

the above entitled action, may be omitted on the part of the plaintiff in error, and that such appeal may proceed with the same force and effect as though said bond had been given.

Dated this 9 day of February 1917.

JOHN L. ERDALL &
NEWTON, DULLAM & YOUNG,
Attorney- for Plaintiff in Error.
MILLER & ZUGER,
Attorney- for Defendant in Error.

[Endorsed:] Filed in District Court, Burleigh County, North Dakota, Feb. 14th A. D. 1917. Chas. Fisher, Clerk.

71 In the Supreme Court of the United States.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE C. L. MERRICK COMPANY, Defendant in Error.

UNITED STATES OF AMERICA.
State of North Dakota, District Court of the Sixth Judicial District, County of Burleigh, North Dakota, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

I hereby further certify that under the laws of the state of North Dakota, the files and records of all proceedings in said suit, are returned to the clerk of the trial court at the end of sixty days after final determination of said cause in said supreme court, and that the record and proceedings in the within cause were so duly returned and filed with me as clerk of the sixth judicial district, county of Burleigh in the State of North Dakota, after final determination of said cause in said Supreme Court of North Dakota, and that I am the lawful custodian of such records.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the District Court, 6th Judicial District, County of Burleigh, this 14th day of February, 1917.

[Seal District Court, Sixth Judicial District, Burleigh County, North Dakota.]

CHAS. FISHER,
Clerk of the District Court of the 6th Judicial District, County of Burleigh, State of North Dakota.

Endorsed on cover: File No. 25,840. North Dakota District Court, 6th Judicial District. Term No. 1010. Minneapolis, St. Paul & Sault Ste. Marie Railway Company, plaintiff in error, vs. The C. L. Merrick Company. Filed March 19th, 1917. File No. 25,840.

DEC 1

No. [redacted] 16

Supreme Court of the United States.

October Term 1916.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE C. L. MERRICK COMPANY,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF NORTH DAKOTA.

Brief of Plaintiff in Error.

JOHN L. ERDALL,
Attorney for Plaintiff in Error.

A. H. BRIGHT AND
H. B. DIKE,
Of Counsel.

Review Publishing Company, 225 So. 3rd St., Minneapolis

INDEX

CASES CITED.

No. 1016.

Supreme Court of the United States.

October Term 1916.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE C. L. MERRICK COMPANY,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF NORTH DAKOTA.

STATEMENT.

For convenience the defendant in error, who was plaintiff in the trial Court, will be referred to as plaintiff; and the plaintiff in error, who was defendant in the trial Court, will be referred to as defendant.

This action was brought by the plaintiff to recover from the defendant a sum alleged to have been unlawfully exacted by the defendant from the plaintiff in excess of the legal rate for transporting coal in North Dakota between July 1, 1907, and March 5, 1910. The defendant collected from the plaintiff for the transportation of the coal the rates prescribed by its duly published and filed tariffs. The rates so collected were in excess of the rates prescribed by Chapter 51 of the laws of North Dakota for the year 1907. The plaintiff seeks to recover the

difference between the tariff rates and such statutory rates, predicating its right of action upon said Chapter 51.

A jury was waived. There is no dispute in respect to the facts. The findings of fact made by the trial Court were as follows (pp. 9, 10 and 11 of Record):

1. That during all of the times mentioned in the complaint the plaintiff was a corporation duly organized under the laws of the State of North Dakota and a citizen and resident of that state.

2. That during all of the times mentioned in the complaint the defendant was a railroad corporation duly organized under the laws of the State of Minnesota and during all of said times was engaged as a common carrier of freight and passengers in said State of North Dakota.

3. That between the first day of July, 1907, and the first day of March, 1910, the defendant received and transported for the plaintiff a considerable number of carloads of coal within the State of North Dakota; that the defendant charged and collected therefor the rates duly prescribed by its tariffs which rates so charged and collected exceeded in the aggregate the rates prescribed by Chapter 51 of the laws of North Dakota for the year 1907, by the sum of three hundred thirty-two and 08/100 dollars ($332.08).

4. That the defendant refused to deliver said coal or any part thereof unless the plaintiff would pay said tariff rates and plaintiff paid the same under protest.

5. That before the commencement of this action plaintiff demanded of defendant that it refund to the plaintiff all rates charged and collected on such coal shipments in excess of the rates prescribed by said Chapter 51, but defendant refused to repay the same or any part thereof.

6. That on or about the 7th day of August, 1907, the Attorney General of North Dakota, on behalf of and in the name of the State of North Dakota, commenced an action in the Su

preme Court of that state against the defendant. In his petition the Attorney General pleaded in substance that Chapter 51, of the laws of 1907, had been duly enacted and *that it was and had been in force ever since the first day of July, 1907;* that defendant refused to comply with it and was charging rates in excess of the rates prescribed by it; that the defendant was violating said law and threatened to continue to violate the same; that the entire people and all citizens of the state were vitally interested in the rates charged for the transportation of coal. The petition prayed for an injunction enjoining the defendant from violating said law.

The defendant made answer to this petition and pleaded, among other things, that said Chapter 51 was void for the reason that it violated the 14th amendment to the Federal Constitution.

7. That on the 22nd day of May, 1909, after a hearing was duly had in said action, the Supreme Court of the State of North Dakota made and entered its judgment in favor of the state and against the defendant wherein it was ordered and adjudged, among other things, as follows:

> "That said act, to-wit: Chapter 51 of the laws of 1907, is valid and constitutional; that the petitioner is entitled to the relief asked, and further that a writ issue herein requiring the defendant to put in force the rates prescribed by said act."

8. That on the application of the defendant a writ of error was duly issued out of the Supreme Court of the United States to review the judgment of the state court last referred to. The decision of the United States Supreme Court was filed on March 14, 1910, and is reported in volume 216, of the United States Reports, p. 579. The mandate of the United States Supreme Court to the state Court, among other things, provided:

> "It is now hereby ordered and adjudged by this Court that the judgment of the state Supreme Court in this cause be, and the same hereby is, affirmed with costs, but without

prejudice to the right of the Railway Company *to reopen the case by appropriate proceedings,* if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

9. That on the 13th day of September, 1910, pursuant to the mandate of the Supreme Court of the United States the state Supreme Court entered a judgment in said action which, among other things, provided:

> "It is hereby ordered and adjudged that the judgment heretofore rendered and entered by this Court be and the same is hereby affirmed, *but with the modification that such affirmance is without prejudice to the right of the Railway Company to reopen the case by appropriate proceedings, if after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."*

10. That on the 3rd day of July, 1911, pursuant to said mandate and said judgment last referred to, the defendant filed its petition to reopen said case and to take further testimony showing the confiscatory character of the rates for coal. The Supreme Court of the state thereupon granted said petition. Thereafter further testimony was taken and after having duly considered the same the Supreme Court of the state made and filed its further opinion embodying findings of fact and conclusions of law which are reported in volume 26, of the North Dakota Reports, p. 438. Judgment was entered in accordance with said findings in said state Supreme Court on the 2nd day of February, 1914, adjudging that "The writ of injunction heretofore issued herein requiring and commanding the defendant to put and keep in force the rates prescribed in the act, is hereby made permanent and in all things affirmed."

11. That thereafter upon the application of the defendant a writ was again duly issued out of the Supreme Court of the United States to review the judgment last mentioned. The decision of the United States Supreme Court was filed on or about

the 8th day of March, 1915, and is reported in volume 236, United States Reports, p. 585, whereby the judgment of the state Supreme Court of February 2nd, 1914, was reversed; that on the 9th day of April, 1915, the Supreme Court of the United States issued its mandate to the state Supreme Court in accordance with the opinion last referred to.

12. That thereafter on the 9th day of July, 1915, the Supreme Court of the state pursuant to the mandate last referred to entered its final judgment in said action between the state and the defendant adjudging and decreeing, among other things:

> "1. That the judgment of this Court in this cause be and such judgment is hereby reversed and set aside.
> 2. That this action be and the same is hereby dismissed.
> * * * *
> "It is further adjudged and decreed that the clerk enter this judgment and decree *nunc pro tunc* now as of June 5th, 1915."

13. That there was no substantial change in the railroad of the defendant located in the State of North Dakota between the first day of July, 1907, and the first day of July, 1911; that there was no substantial change in the lignite coal mines tributary to the line of the defendant in North Dakota during the time last mentioned. All lignite coal handled intrastate by the defendant during this period came from the same mines. That there was no substantial difference in the cost of handling the intrastate lignite coal traffic on the line of the defendant during this period; that the conditions under which such traffic was handled on the lines of the defendant during this period were substantially the same; the only material difference being that the tonnage gradually increased from eighty-seven thousand two hundred sixteen (87,216) tons in 1907 to two hundred five thousand thirty-eight (205,038) tons for the year ending June 30, 1911; that the railroad connections between this defendant and other railway companies, so far as it related

to the handling of intrastate lignite coal, were the same during this entire period and such traffic was handled as between the carriers in the same way and under the same conditions.

The trial Court also made and filed the following conclusions of law:

> "1. That Chapter 51, of the laws of North Dakota, as applied to the defendant herein, was from the date of its enactment in conflict with the fourteenth amendment to the Federal Constitution, and hence unconstitutional and invalid *ab initio*.
>
> 2. That the action brought in the name and on behalf of the state by the Attorney General referred to in the findings of fact was brought on behalf of all the citizens of the state; that the proceedings in said suit in the name and on behalf of the state constituted one action in which there was only one final judgment, namely, the judgment entered as of the 5th day of June, 1915; that the proper construction and necessary effect of the judgment last referred to was to finally determine that said Chapter 51, as applied to this defendant was unconstitutional from the date of its enactment and that the plaintiff was and is conclusively bound thereby.
>
> 3. That Section 142, of the constitution of North Dakota, if it applies to the present case is void and inoperative because it is repugnant to and violates said fourteenth amendment to the constitution of the United States.
>
> 4. That judgment be entered herein dismissing the action of the plaintiff and for costs and disbursements in favor of the defendant.
>
> 5. It is therefore ordered that the judgment be entered herein in favor of the defendant in accordance with the foregoing findings of fact and conclusions of law."

A judgment was entered pursuant to said findings dismissing the complaint upon its merits and with prejudice.

An appeal was taken to the Supreme Court of the State of North Dakota. The latter Court reversed the judgment of the trial Court. Final judgment was entered in favor of the plaintiff and against the defendant for the amount of the alleged overcharges.

Upon application of the defendant a writ of error was duly

issued out of the Supreme Court of the United States to review the judgment of the state Court last referred to.

The defendant will frequently refer in its brief to the case of *State ex rel McCue v. N. P. Ry. Co., et al.* For brevity it will be designated as the "*North Dakota case.*" For the same reason the case under consideration on this appeal will be referred to as the "*Merrick case.*"

ASSIGNMENT OF ERRORS.

(Pages 39 and 40 of Record.)

1. The Supreme Court of North Dakota erred in reversing the judgment in favor of the plaintiff in error entered in the District Court of the Sixth Judicial District of North Dakota.

2. The Supreme Court of North Dakota erred in ordering final judgment to be entered in this proceeding in favor of the defendant in error and against the plaintiff in error.

3. The Supreme Court of North Dakota erred in deciding and adjudging that defendant in error was entitled to recover from the plaintiff in error the difference between the statutory rates on coal (provided in Chapter 51 of the laws of North Dakota for the year 1907) and the rates collected by the plaintiff in error pursuant to its tariffs; and in deciding and adjudging that said Chapter 51 did not deprive plaintiff in error of its property without due process of law in violation of Section 1, Article 14, of the Constitution of the United States.

4. The Supreme Court of North Dakota erred in refusing to hold that the maximum rates prescribed by said Chapter 51 were confiscatory and therefore unconstitutional and void because repugnant to Section 1 of Article 14 of the Constitution of the United States.

5. The Supreme Court of North Dakota erred in deciding and adjudging that Section 142 of the Constitution of North Dakota (which provides: "The rate fixed by the Legislative

Assembly or Board of Railroad Commissioners shall remain in force pending the decision of the Courts.") was not repugnant to Section 1 of Article 14 of the Constitution of the United States.

ARGUMENT.

Briefly stated, the position of the defendant is this:

Chapter 51 as applied to it is unconstitutional and invalid from the beginning, hence no cause of action against it can be predicated upon said Chapter 51.

Point I.

THE PLAINTIFF IN THE MERRICK CASE WAS A CITIZEN AND RESIDENT OF THE STATE OF NORTH DAKOTA WHEN THE NORTH DAKOTA CASE WAS LITIGATED. THE LATTER CASE WAS BROUGHT ON BEHALF OF ALL OF THE CITIZENS OF NORTH DAKOTA AND ALL CITIZENS OF THAT STATE ARE BOUND BY THE FINAL JUDGMENT ENTERED THEREIN.

In his petition for an injunction the Attorney General among other things pleaded:

> "Coal is one of the principal and natural products of this state, and is produced in large quantities all through the western portion thereof. The question of the rate charge for the transportation of the same within this state is a subject in which the entire people and all the citizens of the state are deeply concerned and it is one of vital interest to all the citizens of this state.
>
> That unless this Court assumes jurisdiction and issues an order of injunction to prevent the defendant from charging a higher rate for the transportation of coal than that which is provided for by the laws of this state, the defendant will continue to violate the law and cause the citizens thereof to pay excessive charges for the transportation of coal and will therefore continue to work a great hardship on the people of this state, as aforesaid."

From the foregoing it is apparent that the *North Dakota case* was commenced by the Attorney General in his *representative* capacity for and on behalf of *all the people of the state.* Under such circumstances all the people of the state are bound by the decision and judgment in such case.

State v. Vilis, 19 N. D. 209, 124 N. W. 706, p. 225.

Ashton et al. v. City of Rochester, et al., 133 N. Y. 187, p. 193.

McConkie v. Remley, 119 Ia. 512, 93 N. W. 505, p. 507.

Town of Fulton v. Pomeroy, 111 Wis. 663, 87 N. W. 831, p. 832.

People v. Harrison, 253 Ill. 625, 97 N. E. 1092.

There is really no controversy in respect to the proposition included in point one. The controversy arises in respect to which one of the two judgments entered in the *North Dakota case* controls in the present case. The plaintiff asserts that the judgments entered in 1910 controls and the defendant insists that the judgment entered in 1915 controls.

Point II.

THE JUDGMENT ENTERED IN THE NORTH DAKOTA CASE SEPTEMBER 13, 1910, WAS NOT A FINAL JUDGMENT THEREFORE IT CANNOT BE PLEADED AS RES ADJUDICATA IN FAVOR OF THE PLAINTIFF. THERE WAS ONLY ONE ACTION IN THE LITIGATION DESIGNATED AS THE NORTH DAKOTA CASE AND THE FINAL JUDGMENT ENTERED IN THAT LITIGATION WAS THE JUDGMENT REVERSING THE JUDGMENT OF THE STATE COURT AND DISMISSING THE ACTION ON ITS MERITS IN JUNE 1915.

An appeal was taken from the judgment entered in 1909 in the *North Dakota case* to the Supreme Court of the United States. On that appeal the decree of the state Court was affirmed but conditionally.

Northern Pacific Railway Company v. North Dakota, 216 U. S. 579. On pages 580 and 581 the Court said:

> "That carriage of coal is a very small part of the rail road's business. The estimate of the cost is admitted to be uncertain, and to depend in part upon arbitrary postulates. It has to be increased considerably above the average cost for freight in order to make out the plaintiff in error's point. We are far from saying that the argument for doing so does not seem to us to *have considerable probability on its side*. We do not say that experiment may not establish a case in the future that would require a decision upon the question of constitutional law. *But we can express no opinion upon it now.* * * * It seems to us that the nearest approach to justice that can be made at this time is to follow the precedent of *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, *as nearly as may be*, and affirm the decree, but without prejudice to the right of the railroad company to *reopen* the case by appropriate proceedings if, *after adequate trial*, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

Accordingly on the 13th day of September 1910, pursuant to the mandate of the United States Supreme Court, the state Supreme Court entered a judgment in the *North Dakota case* which provides as follows:

> "It is hereby ordered and adjudged that the judgment heretofore rendered and entered by this Court be, and the same is, hereby affirmed, *but with the modification that such affirmance is without prejudice to the right of the Railway Company to reopen the case by appropriate proceedings, if, after adequate trial, it thinks it can prove more clearly than at present, the confiscatory character of the rates for coal.*"

On the 3rd day of July 1911, having tried the rate for a year, the defendant filed its petition to *reopen* the *North Dakota case* and to take further testimony. The Supreme Court of the state granted this petition and ordered that the case should be reopened.

When the case was thus reopened, the judgment entered in 1910, could not be considered as a final judgment, nor could it

be pleaded as *res adjudicata* in favor of either party. *The right to introduce, and the introduction of, additional testimony, made the final result uncertain.*

After the case had been reopened and further testimony was taken, and after having duly considered the same the Supreme Court of the state entered its judgment on the 2nd day of February 1914. *The latter judgment refers to the previous judgments as intermediate steps in the litigation. The previous judgments therefore, according to law, and according to the express language used, were merged in the judgment entered February 2, 1914. At the latter time the only judgment which was in force was the judgment entered in February 1914.*

The latter judgment was as follows:

> "This Court having on the 27th day of May, A. D. 1909, duly entered its judgment in the above entitled proceeding in favor of the plaintiff and against the defendant, which judgment was as follows:
>
> > 'The Attorney General having filed his verified petition herein asking that a writ issue out of this Court requiring and commanding the defendant to put in force the rates fixed by Chapter 51, Laws of 1907, and issue having been joined thereon by the serving and filing of defendant's answer thereto, and the testimony of both parties upon the issues thus joined having been taken before a referee and the same having been reported to this Court for examination and consideration, in the form of an agreed record termed a "Consolidated Record" and said cause having been submitted by both parties upon said record, which contains all the evidence offered and proceedings taken herein, the Court having considered said evidence, the arguments and briefs of counsel, and having made and filed its written opinion sustaining the petition and the validity of said law and the right of the petitioner to the relief asked, NOW, THEREFORE, in pursuance of such opinion, conclusions and order, it is hereby
>
> > ORDERED AND ADJUDGED, That said act, to-wit, Chapter 51, Laws of 1907, is valid and constitutional; that the petitioner is entitled to the relief asked, and, further, that a writ issue herein requiring

and commanding the defendant to put in force the rates prescribed in said act.'

"And the defendant feeling aggrieved thereby and having removed the same to the Supreme Court of the United States by writ of error, and the said Supreme Court of the United States, after hearing upon the merits, having affirmed the judgment of this Court, *but conditionally with the right granted to the defendant to reopen the case*, which affirmance and right are embraced in the following language in the decision of said Court:

> 'The same is hereby affirmed with costs, but without prejudice to the right of the railroad company to reopen the case by appropriate proceedings if, after adequate trial, it thinks it can prove more clearly than at the present the confiscatory character of the rates for coal, and that the said plaintiff recover against the said defendant, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, for its costs herein expended and have execution therefor.'

"And this Court, on the 13th day of September 1910, pursuant to the mandate of the Supreme Court of the United States, having entered its judgment in terms as follows:

> 'It is hereby ordered and adjudged that the judgment heretofore rendered and entered by this Court be, and the same is hereby, affirmed, but with the modifications that such affirmance is "without prejudice to the right of the railroad company to reopen the case by appropriate proceedings if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal, and that the said plaintiff recover against said defendant, Minneapolis, St. Paul, Sault Ste. Marie Railway Company, for its costs herein expended, which are to be taxed by the clerk, and that it have execution therefor'."

"And thereafter, on the 3rd day of July 1911, the defendant, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, having filed its petition for leave to reopen said *case, and take further testimony therein* showing the confiscatory character of the rates for coal, *and this Court having allowed the reopening of said case* and appointed a referee therein, before whom said testimony should be taken, and said testimony having been taken and returned into this Court and having been duly considered by this Court, it is now hereby again,

"ORDERED AND ADJUDGED that said act, to-wit, Chapter 51, Laws of 1907, is valid and constitutional, and that the State of North Dakota is entitled to the relief asked, and that the writ of injunction heretofore issued herein requiring and commanding the defendant to put and keep in force the rates prescribed in said act is hereby made permanent and in all things affirmed. And it is ordered and adjudged further, that the petitioner, the State of North Dakota, upon the relation of the Attorney General, do have and recover from the defendant, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, its costs herein expended which are to be taxed by the clerk."

An appeal was taken from the latter judgment to the Supreme Court of the United States and on this appeal the judgment of the state Court entered in February 1914, was reversed.

Northern Pacific Ry. Co. v. North Dakota, 236 U. S. 585. What was decided in the latter case is tersely stated in the last syllabus, page 586:

> "As the maximum intrastate rates on coal in carload lots fixed by ch. 51 of the laws of North Dakota are unreasonable either requiring the carrier to transport the commodity at a loss or for a merely nominal compensation after taking into account the entire traffic to which the rates apply—the State exceeded its authority in *enacting the statute* which amounts to an attempt to take the property of the carrier without due process of law in violation of the Fourteenth Amendment."

The mandate of the United States Supreme Court in the case last referred to also refers to the commencement of the original action in the *North Dakota case;* to the first judgment entered, namely, in May 1909; to the appeal from such judgment taken to the United States Supreme Court and to the affirmance *conditionally* of the first judgment entered by the state Court; to the entry of the modified conditional judgment in the state Court in September 1910; to the petition of the defendant for leave to *reopen* the case *and to take further testimony therein;*

to the *reopening* of the case and the taking of *further testimony*, and the entry of the judgment in February 1914, and orders and adjudges that the judgment of the state Court last referred to (which embraced the previous judgments as before explained) be reversed with costs. The mandate last referred to is as follows:

> "To the Honorable the Judges of the Supreme Court of the State of North Dakota, GREETING:
>
> WHEREAS, Lately in the Supreme Court of the State of North Dakota, before you, or some of you, in a cause between *The State of North Dakota, ex rel. T. F. McCue, Attorney General, plaintiff, and Minneapolis, St. Paul & Sault Ste. Marie Railway Company, defendant*, wherein the judgment of the said Supreme Court, entered in said cause on the second day of February, A. D. 1914, is in the following words, viz: * * *", and then the judgment last referred to, which we have already quoted is given verbatim.

and then the mandate continues:

> "* * * as by the inspection of the transcript of the record of said Supreme Court which was brought into the SUPREME COURT OF THE UNITED STATES by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears, and
>
> WHEREAS, in the present term of October, in the year of our Lord One Thousand Nine Hundred and Fourteen, the said cause came on to be heard before the SUPREME COURT OF THE UNITED STATES on the said transcript of record, and was argued by counsel.
>
> ON CONSIDERATION WHEREOF, It is now here ORDERED AND ADJUDGED by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed with costs * * *". (Then follow provisions in respect to costs.)
>
> "IT IS FURTHER ORDERED that this cause be, and the same is hereby, remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court." * * *

In accordance with the opinion and mandate of the United States Supreme Court last referred to the state Supreme Court entered a final judgment in the *North Dakota* case on June 3,

1915, as follows:

> "This cause came on to be heard upon the application of the defendant, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, for judgment in its favor upon the mandate of the Supreme Court of the United States bearing date April 9, 1915, and filed with the clerk of this Court on June 2, 1915.
>
> NOW, THEREFORE, it is by the Court adjudged and decreed:
>
> 1. That the judgment of this Court in this case be and such judgment is hereby reversed and set aside.
>
> 2. That this action be and the same is hereby dismissed." • • •

An examination of the record in the *North Dakota case*, which was all before the trial Court when it made its findings of fact and conclusions of law, establishes conclusively, it seems to us, that the judgment entered September 13, 1910, was not intended to be a final judgment. It was an interlocutory judgment and was merged in the final judgment entered in June 1915. In short, that the second conclusion of law found by the trial Court was right, namely:

> "That the action brought in the name and on behalf of the state by the Attorney General referred to in the findings of fact was brought on behalf of all the citizens of the state; that the proceedings in said suit in the name and on behalf of the state constituted one action in which there was only one final judgment, namely, the judgment entered as of the 5th day of June, 1915; that the proper construction and necessary effect of the judgment last referred to was to finally determine that said Chapter 51, as applied to this defendant was unconstitutional from the date of its enactment and that the plaintiff was and is conclusively bound thereby."

We think this construction is also supported by the authorities. 23 *Cyc.* 1128:

> "A judgment which is not to become effective unless certain conditions are complied with, or which may be defeated and annulled by the performance of conditions subsequent, is no bar to a second action on the same subject matter, unless it has become absolute by the performance

of conditions in the one case or failure to perform in the other."

Bostwick v. Birnkchoff, 106 U. S. 3:

"The rule is well settled and of long standing, that a judgment or decree to be final, within the meaning of that term, as used in the Acts of Congress giving this Court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case so that if there should be an affirmance here the Court below would have nothing to do but execute the judgment or decree it has already rendered. * * * If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently it has been uniformly held that a judgment of reversal with leave for further proceedings in the Court below cannot be brought here on writ of error."

Dusing v. Nelson, 2 Pac. 922, p. 923:

"A judgment, to have the authority, or even the name of *res adjudicata*, must be a definite judgment of condemnation or dismissal. Poth. Ob. Pt. 4, C. 3, Sec. 3. If the order entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory, and not final. To be final it must end the particular suit in which it is entered."

Lamprey v. Pike, et al., 28 Fed. 30:

"Where a decree has been obtained in a Minnesota State District Court against non-resident defendants, in a suit begun by the publication of summons, and, upon their appearance within one year from the time judgment was rendered, an order was made by the District Court *reopening the case*, and permitting the defendants to come in and defend, and afterwards another suit was brought and transferred to the United States Circuit Court. Held, that the order allowing defendants to come in and defend nullified the decree as a judgment *res adjudicata*, and cannot be relied upon as concluding the parties." * * *

For further authorities and illustrations of the rule see:

McFarland v. Byrnes, 187 U. S. 246.

Clark v. Kansas City, 172 U. S. 334.

Hasletine v. Central Bank of Springfield, 183 U. S. 130.

McCurdy v. Middleton, et al., 7 Pac. 655.
Roemer v. Newmann, et al., 26 Fed. 332.
Australian Knitting Co. v. Gormly, 138 Fed. 92.
Union Planters Bank v. City of Memphis, 64 S. W. 13.
Harron v. Johnson, 60 Kentucky 578.
Wolfe v. Potts, 42 S. W. 189.
People v. Miller, 195 Ill. 621, 63 N. E. 504.
Johnson v. Hesser, 85 N. W. 894.

Point III.

THE FINAL JUDGMENT ENTERED IN THE NORTH DAKOTA CASE CONCLUSIVELY DECIDES THAT CHAPTER 51, AS APPLIED TO THE BUSINESS OF THE DEFENDANT, WAS, FROM THE TIME OF ITS ENACTMENT, UNCONSTITUTIONAL AND INVALID.

23 *Cyc.* p. 1302 states the rule which is controlling as follows:

> "The general rule is that a judgment is conclusive, for the purposes of a second action between the same parties or their privies, of all facts, questions, or claims which were directly in issue and adjudicated, whether the second suit be upon the same or a different cause of action.
>
> A point or question is 'in issue' in a suit, in such sense that it will be concluded by the judgment therein, when an issue concerning it is directly tendered and accepted by the pleadings in the case."

From the pleadings in the *North Dakota case* it is evident that the only question at issue was the validity and enforcibility of Chapter 51. On behalf of the state the Attorney General claimed that said Chapter was and had been in full force and effect since July 1, 1907, the date of its enactment, and that the defendant from and after said date was required to comply with it, and to charge the rates therein named.

The defendant claimed that said law was unconstitutional as applied to it from the beginning and for that reason it could

not lawfully be required to comply with the law.

The validity of Chapter 51 from the beginning and up to the time judgment was entered in 1915 was therefore in issue in the *North Dakota case*. The final judgment entered in 1915, which reversed the previous judgments of the State Court (holding the rate statute valid) and which dismissed the entire action without any qualification, necessarily decided that the rate statute was unconstitutional and invalid from the time of its enactment.

Aurora City v. West, 7 Wallace (U. S.) 82, p. 103.
New Orleans v. Citizens Bank, 107 U. S. 371.
Manhattan Trust Co. v. Trust Co. of No. Am., 107 Fed. 328.
Iowa County Supervisors v. Mineral Point R. R. Co., et al, 24 Wis. 93, pp. 118-123.

Point IV.

THE RULE STATED AND APPLIED IN MISSOURI V. C. B. & Q. R. CO., 241 U. S. 533, HEREINAFTER CALLED THE "BURLINGTON CASE", SHOULD NOT BE APPLIED IN THE MERRICK CASE.

The opinion of the Supreme Court of North Dakota shows clearly that the *Merrick case* was decided solely upon the authority of the *Burlington case*. We appreciate, therefore, that whether or not the rule laid down in the *Burlington case* is to control presents the crucial question in this litigation. As we view it there is no necessity and no good reason why the rule in the *Burlington case* should be applied in the *Merrick case*.

The *Burlington case* was brought by the State of Missouri to recover a sum of money for passenger fares in excess of the rate established by law, paid by its officers, when traveling within the state on state business. The Burlington Company answered that the rates fixed by law were so low as to be confiscatory. The state then made a motion to strike out this defense

on the ground that the right to assert it was barred by the decree of the Supreme Court of the United States in the *Missouri Rate Case* and that the Railroad Company was estopped from denying the effect of the latter decree. The Burlington Company contended that it had the right to interpose the defense of confiscation because the words "without prejudice" used in the decree in the *Missouri Rate Case* left the whole subject open for a renewed attack.

The passenger rates involved in the *Burlington case* were collected during the period of time involved in the *Missouri rate case*. The Burlington Company was a party to the latter case and it was decided that the *Missouri rate case controlled*. Under the circumstances, it becomes necessary to consider briefly what the facts were and what was decided in the *Missouri rate case* (230 U. S. 474). The facts in the latter case, so far as material, were as follows: The Legislature of Missouri had enacted a two-cent passenger fare statute. The Burlington and other companies brought suits to enjoin the enforcement of the statute on the ground that it was confiscatory.

While the *Missouri rate case* was pending in the Federal trial Court, the case of *Knoxville v. Water Co.*, 212 U. S. 1, was decided. The rule laid down in the *Knoxville case*, as it has been since construed and followed in *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, and other cases amounts practically to this:

That a Court will not declare a statute or an ordinance fixing rates for a public service corporation unconstitutional and suspend their operation before they go into effect and have actually been tested.

The decision of the lower Court in the *Missouri rate case* is reported under the title of *St. Louis & S. F. R. Co. v. Hadley*, in 168 Fed. Rep. 317. From the findings of fact made in the latter case, we quote the following, p. 321:

> "The complainants asked for a temporary injunction against the enforcement of the two-cent passenger fare statute. This Court held that the statute should be given a

> trial for five months and ascertain the result by actual operation. In preparing the order, counsel, no doubt by inadvertence, fixed three months as the period for trial as to the results. But by acquiescence of both sides, or, if not, by delays with which the Court was not chargeable, such status remained far more than one year."

It is to be noted therefore that before the *Missouri Rate Case* was brought to trial *an actual test of the passenger rate law was made covering a period of more than one year,* in accordance with the rule in the *Knoxville case.*

The lower Court found that the passenger rate statute was confiscatory and issued an injunction restraining the state officers from enforcing the law. On appeal, the United States Supreme Court, reversed the judgment of the lower Court which held the rate unconstitutional. The following mandate was entered (230 U. S. 509):

> "The decrees in numbers 9, 12 (referring to the proceedings on behalf of the Burlington Company) * * * are reversed and the case is remanded with directions to dismiss the bills respectively without prejudice."

In the *Missouri rate case* the Court did, therefore, *pass upon the constitutionality* of the rate statute and held it to be valid.

When the *North Dakota case* was first submitted to the Supreme Court of the State the *Knoxville case* had not been decided. The rule stated in the latter case had not been announced. The parties to the *North Dakota case,* having no notice of this rule, engaged in the litigation *without any actual trial of the rate.*

Again, when the *North Dakota case* first came before the United States Supreme Court that Court evidently thought that the rate statute of North Dakota was unconstitutional. The Court said 216 U. S. p. 580:

> "The estimate of the cost is admitted to be uncertain, and to depend in part upon arbitrary postulates. It has to be increased considerably above the average cost for freight in order to make out Plaintiff in Error's point.

We are far from saying that the argument for doing so does not seem to us to have considerable probability on its side."

And the Supreme Court of the United States at that time expressly declined to pass upon the constitutionality of the North Dakota Statute. On page 581 the Court said:

> "We do not say that experiment may not establish a case in the future that would require a decision upon the question of constitutional law. *But we can express no opinion upon it now."*

There were good reasons therefore why the constitutionality of the North Dakota Statute should be left open for future determination and why a different judgment should be entered in the *North Dakota case* from that entered in the *Missouri rate case.*

And a different judgment was entered in the *North Dakota case* in *1910* from the final judgment entered in the *Missouri rate case.* In the latter case the judgment dismissed the suit, and this judgment was simply qualified by the words "without prejudice." The judgment entered in the *North Dakota case* in 1910 expressly secured to the carrier the right to *reopen the case* after the rate had been tested.

The words "reopen a case" as used in decisions and judgments of courts have acquired a definite and certain meaning. *Three Bouvier's Law Dictionary,* page 2882, gives the following definition: "To reopen a case is to permit the introduction of new evidence and practically try it anew."

It requires no citation of authorities to establish that such is the usual as well as the literal interpretation of these words, and this interpretation accords exactly with what was done in respect to the various mandates and judgments embraced in the *North Dakota case.*

In the *Burlington case* the Court decided that the words which qualified the judgment in the *Missouri rate case,* namely, "without prejudice" were intended to apply only to the future so as to enable the Court to modify the judgment in the future,

if, from future operation and *changed conditions* arising in such future it should appear right to do so. That it was not intended by the use of these qualifying words to leave open the controversy as to the period with which the decree dealt. The *North Dakota case* was referred to as an illustration of the rule.

We assume, of course, that when *changed conditions* are referred to in the *Burlington case* that such *conditions* relate to something independent of the rate itself, that the rate in such cases is the same but that other conditions arising in such future bring about a different result. Hence the rule.

As applied to the *Burlington case* the rule is undoubtedly sound. We submit, however, that it is not properly applicable to the *North Dakota case* and that the *North Dakota case* is not a good illustration of the operation of the rule.

It is perfectly plain from an examination of the proceedings in the *North Dakota case* that no one understood that the right of the railroad company to *reopen* the case was dependent upon any *change in conditions*. No claim was made to that effect by the State and no offer of evidence was made by either party bearing upon this question. The last decision of the United States Supreme Court *does not refer to any change in conditions*, much less does it assign such *change of conditions* as a reason for its conclusion (236 U. S. 585).

The finding of fact made in the *Merrick case* expressly and positively negative that there was any change in conditions. (See 13th finding of fact page 11.) On the contrary, this finding is to the effect that the conditions were all exactly the same.

The judgment entered in 1914 by the State Court in the *North Dakota case* was not reversed because of any change in conditions. Consequently we say the second decision of the United States Supreme Court in that case cannot properly be said to be an application or illustration of the rule in the *Burlington case*.

The Court was not even called upon to decide in the *Burlington case* what should be the effect of the various judgments in the *North Dakota case*. The reference in the *Burlington case* to the *North Dakota case* was simply by way of illustration and argument. What was said in that case, therefore, should not and will not control in this case where the effect of those judgments is the very question to be decided.

Again as we have already shown, the situation with respect to the *North Dakota case* when the *Merrick case* was tried was quite different from the situation with respect to the *Missouri rate case* when the *Burlington case* was tried. The judgment in force in the *Missouri rate case*, which controlled the *Burlington case*, was one dismissing the bill of the Burlington Company. The necessary effect of that judgment, taking into account the character of the bill, was to *sustain the rate law*, at least until it should be modified pursuant to the qualifying clause "without prejudice."

When the *Merrick case* was brought to trial the Supreme Court of the United States had reversed the decision of the State Court in the *North Dakota case*. That reversal expressly embraced the several judgments entered in the same proceeding sustaining the rate law. Not only was this the language of the mandate but this was evidently the intention of the United States Supreme Court because it said: "The State exceeded its authority *in enacting the statute* which amounts to a taking of the property of the carrier without due process of law in violation of the Fourteenth Amendment." (236 U. S. 585.)

The judgment entered subsequently, pursuant to the mandate and opinion last mentioned, reversed the judgment entered in 1914 (which included the judgment entered in 1910) and dismissed the entire action. The effect of the latter judgment was to declare the rate statute invalid from the time of its enactment. This was evidently the intention of the State Court which entered the latter judgment, and this was the construc-

tion which the latter Court would undoubtedly have placed upon it if it had not concluded that it was compelled to do otherwise by reason of the *Burlington case.*

In a recent case decided by the Supreme Court of North Dakota where the validity of the same rate statute involved in the *Merrick case,* was under consideration, namely, in the case of *Minneapolis, St. Paul & Sault Ste. Marie Railway Company v. Washburn Lignite Coal Company,* 168 N. W. 684, Justice Christianson said on page 691:

> "At the time the case of *Merrick Co. v. Minneapolis, St. Paul & Sault Ste. Marie Railway Company, supra,* was submitted the writer was inclined (as were, in fact, all the members of this Court) to hold that the first decree, which was qualified as "without prejudice," had been superseded by the final decree, and that the rights of the parties in the *Merrick case* must be measured by the final decree in the *rate case.*"

Why should not the judgment entered in the *North Dakota case* in 1910 be construed as we claim?

There can be no question of the authority of the Court to enter such a judgment; that would involve the exercise of no unusual or extraordinary power. It would simply amount to granting a new trial conditionally, requiring the rate to be tried and giving to the carrier the option of testing the constitutionality of the statute after such trial. The Court certainly could thus leave open for future determination the whole question of the constitutionality of the rate statute if it thought the circumstances required or justified it. We think the condition of the *North Dakota case* in 1910 fully justified exactly such procedure; that such was the intention of the Courts at that time and such should be the construction now.

Such a construction of the 1910 judgment will not impair nor destroy the rule laid down in the *Burlington case.* Full effect can be given to that rule if it be applied only to cases in which the rate has actually been tested; in which there has

been a satisfactory trial on the merits and the constitutional question in fact decided.

To be sure the Court may say to us, "You had your day in Court before the judgment was entered in 1910. You did not establish clearly the confiscatory character of this statute. You must now suffer the consequences."

The same thing is often said in cases where new trials are applied for. Nevertheless new trials are constantly being granted where it appears probable to the Court that a wrong decision has been rendered. There is no difference in this respect between rate cases and other cases. So the question resolves itself into this: Can the judgment entered in 1910 be construed as we say, and ought it to be so construed?

No important legal or equitable rule, so far as we can see, will be broken by adopting the construction we advocate. If the *Merrick case* can be distinguished from the *Burlington case*, as we think it can in very substantial and important respects, then the decision in the *Burlington case* should not be followed in this case.

There is no danger, under such circumstances, of establishing any bad precedent.

Moreover, it is unlikely that any case like the *North Dakota case* will ever again come before this Court. In view of the rule of the *Knoxville case*, no one will hereafter attack the constitutionality of a rate statute before it goes into effect and without having given it an actual trial.

No injustice will result from adopting such a construction. It will probably be conceded that the rate prescribed by the North Dakota statute was always confiscatory so far as this defendant is concerned.

Speaking of this matter, the Supreme Court of North Dakota, 26 N. D. reports, p. 471, said:

> "In effect and practical operation we cannot conclude other than that the actual figures show with reasonable deductions therefrom, that the final paragraph of Chapter

> 51 of the Session laws of 1907, compelling the pro-rating of rates between connecting carriers, discriminates against the Soo, and, if the statute be otherwise taken as prescribing reasonable rates, forces the Soo to carry its entire lignite business at an actual and considerable loss, or less than the actual reasonable expense of carriage."

Speaking of the same matter, the United States Supreme Court in the *North Dakota case*, Volume 236 U. S. p. 591, said:

> ". . . on making an elaborate examination of the facts disclosed by the record—all the testimony adduced in the three cases being available in each one so far as pertinent—and on taking judicial notice of certain local conditions, the Court was able to find sufficient proof to justify it in determining that under the statutory rate the intrastate transportation of lignite coal was conducted by this company at a loss."

Plaintiff and others who were similarly situated knew that the rate statute was being attacked and that it might be held unconstitutional. They were only required to pay the tariff rates which were in force when Chapter 51 was enacted, which had been duly adopted pursuant to the laws of North Dakota and which under the circumstances, must be presumed to have been reasonable.

Under these circumstances, to adopt the construction contended for by the plaintiff and to permit the plaintiff to recover on the theory that Chapter 51 was a valid statute between July, 1907, and September, 1910, will certainly result in injustice to the defendant. It will amount to the taking of the property of this defendant without due process of law, contrary to the purpose and spirit of the 14th amendment.

Point V.

Section 142 of the Constitution of North Dakota cannot be given the effect claimed by counsel for the plaintiff since to do so would be repugnant to, and would violate the Fourteenth Amendment to the Constitution of the United States.

Section 142 of the Constitution of North Dakota provides as follows:

> "But the rates fixed by the Legislative Assembly, or Board of Railroad Commissioners, shall remain in force pending the decision of the courts."

This provision was probably intended simply to prevent a common carrier from applying a different rate than that fixed by the legislature pending litigation. It was probably not intended to prevent an adjustment between the carrier and the shipper after the litigation should be ended in accordance with the final judgment in such litigation. A construction such as suggested, would make the provision accord with the law as it is generally understood and administered, and would obviate any conflict with the federal constitution.

The rule ordinarily applied and enforced is stated in *Reagan v. Farmers Loan & Trust Company*, 154 U. S. 362. On page 397 the Court say:

> "It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates."

In other words, the state constitution requires that the carrier shall apply the legislative rate until it is otherwise decided. Thereupon an adjustment may be made in accordance with the final decision in such litigation.

Section 1, of the 14th amendment to the federal constitution, so far as material reads as follows:

> "Nor shall any state deprive any person of * * * property without due process of law."

The language quoted is so plain and comprehensive that there can be no question about its meaning. It does not simply prohibit the states from depriving a person of property without due process of law *at some time or under certain conditions*. It clearly and positively prohibits states from passing or enforcing laws which have this effect *at any time or under any conditions*. In other words, such laws must not be passed or enforced at all in order to give full effect to the federal constitution.

As was said by the Supreme Court of the United States in *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, p. 399:

> "The equal protection of the laws which, by the 14th amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, *must in their actual working stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held.*"

Let us briefly consider some of the logical consequences which would follow the adoption of the theories advanced by plaintiff's counsel.

If the conclusions drawn by him were to be approved the

effect would be to modify the 14th amendment very materially. As thus construed it would have to read:

> "Nor shall any state deprive any person of property without due process of law *after it has been finally decided by a court of competent jurisdiction* that the acts complained of amount to the taking of property without due process of law."

Suppose that on the first hearing in the *North Dakota case* the State Supreme Court had upheld the railroad's contention that the law was confiscatory and therefore void under the 14th amendment; that the state had appealed to the Federal Supreme Court from that decision, and that the latter Court had affirmed the State Court's decision; that it had taken from August 3, 1907, to September 13, 1910, to complete such litigation; namely, the same length of time consumed in connection with the first hearing and first appeal, as shown by the records in the *North Dakota case*. Now, if the proviso in the State Constitution in question is to have the force contended for by plaintiff's counsel, then, though the law was found unconstitutional and void *ab initio*, these confiscatory rates must nevertheless be upheld during that three-year period and the plaintiff would have a right to recover the excess freight charges collected by the carrier during that period, for the language of Section 142 is that the rates fixed by the Legislative Assembly "shall remain in force pending the decision of the courts."

Suppose we are right in our contention that the judgment of 1915 in the *North Dakota case* is the final judgment in that litigation; and that this judgment decides that the rate statute is unconstitutional from the time of its enactment.

Nevertheless must that statute be considered constitutional during the period of litigation (from 1907 to 1915) because of the State Constitution? Such would be the result if the arguments and reasonings of counsel for plaintiff are sound. They certainly are not sound because such results would clearly be in conflict with another provision of the Federal Constitution

and numerous decisions of this court.

Article 6 of the United States Constitution provides:

> "This constitution and the laws of the United States, which shall be made in pursuance thereof * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

In *Smyth v. Ames*, 169 U. S. 466, the Court said, page 526:

> "A railroad corporation is a person within the meaning of the 14th amendment declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.
>
> "*A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the 14th amendment of the Constitution of the United States.*
>
> "While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry.
>
> "The cases before us directly present the important question last stated.
>
> "Before entering upon its examination, it may be observed that the grant to the legislature in the constitution of Nebraska of the power to establish maximum rates for the transportation of passengers and freight on railroads in that state has reference to 'reasonable' maximum rates. These words strongly imply that it was not intended to give a power to fix maximum rates without regard to their reasonableness. *Be this as it may, it cannot be admitted that the power granted may be exerted in derogation of rights secured by the Constitution of the United States, or*

that the Judiciary may not, when its jurisdiction is properly invoked, protect those rights.

* * *

"No one, we take it, will contend that a state enactment is in harmony with that law simply because the legislature of the state has declared such to be the case; for that would make the state legislature the final judge of the validity of its enactment, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, *anything in the Constitution or laws of any state to the contrary notwithstanding*, Art. VI. The idea that any legislature, state or federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their judisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation."

To the same effect see also:

Neal v. Delaware, 103 U. S. 370, p. 389.

Scott v. McNeal, 154 U. S. 34, p. 45.

In conclusion we submit that the judgment of the State Supreme Court should be reversed and judgment ordered in favor of the defendant.

Respectfully submitted,

JOHN L. ERDALL.

A. H. BRIGHT,

H. B. DIKE,

Of Counsel.

No. 1[redacted]

Supreme Court of the United States

October Term, 1916.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, *Plaintiff in Error.*

vs.

THE C. L. MERRICK COMPANY, *Defendant in Error.*

In Error to the District Court of the Sixth Judicial District of the State of North Dakota

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Brief of Defendant in Error

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INDEX

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STATEMENT

We shall refer to the defendant in error, who was plaintiff in the state courts, as the plaintiff; and the plaintiff in error, who was defendant in the state courts, as the defendant.

A brief history of the facts out of which this case arises will make plain the legal propositions involved. Chapter 51, Laws of North Dakota for 1907, providing a maximum freight rate on coal carried within that state, became effective on July 1st, 1907; prior to that date the defendant had in force and was collecting on intrastate shipments of lignite coal, a rate fixed by itself, which was considerably

higher than such statute rate. The defendant refused to obey the law on the ground that it was confiscatory; and continued to demand and collect from shippers its own rate until March 14th, 1910, covering the period embraced in this case.

This action is brought to recover of the defendant the difference between the statute rate provided in said Chapter 51 and the rate exacted from the plaintiff after the going into effect of the statute and prior to March 14th, 1910. The amount for which defendant is liable, if any liability exists, is not in dispute.

ARGUMENT

On this statement of facts, which is substantially the same as that of the defendant, the following questions of law arise which will determine the result in this case:

1. Is the first decision of this Court, in Northern Pacific Railway Company vs. State ex rel McCue, 216 U. S. 579, decided March 14th, 1910 *res adjudicata* of the confiscatory character of this statute for the period involved in that case?

2. Section 142, Constitution of North Dakota, provides:

> "*****The legislative assembly shall have power to enact laws regulating and controlling the rates of charges for the transportation of passengers, intelligence and freight, as such common carriers, from one point to another in this state; provided, that appeal may be had to the courts of this state from the rates so fixed; but the rates fixed by the legislative assembly or board in force pending the decision of the courts."

Under this provision could the defendant, pending the decision of the courts in the first case, lawfully charge a rate

in excess of the statute rate provided in Chapter 51, Laws of North Dakota for 1907?

To determine these questions it is necessary to consider the effect of certain litigation between the State of North Dakota and the defendant and other railway companies, both in this court and in the state courts.

Upon the refusal by the defendant and other railway companies to obey the statute rate, the State of North Dakota, on relation of the Attorney General, brought suit and applied to the state Supreme Court for an injunction restraining the defendant, and other railways, from continuing to violate the statute, and to require the defendant to put into force and effect the provisions of said Chapter 51. The defendant answered and alleged that said Chapter 51 was unconstitutional and void in that the rate fixed therein was so unremunerative and low as to be confiscatory, and therefore in violation of the Fourteenth Amendment to the Federal Constitution.

On the final hearing in the state Supreme Court judgment was rendered on the merits holding the statute rate reasonable and not in violation of the Fourteenth Amendment, and granting the relief prayed for in the petition. This decision is dated April 16th, 1909.

State ex rel. McCue vs. N. P. Ry. Co., 19 N. D. 45; 120 N. W. 869.

The defendant then brought the case to this court on writ of error; filed a supersedas bond as directed by this court; and obtained a stay of execution of the decree and mandate of the state court, pending the hearing and decision of this

court.

On March 14th, 1910, the Supreme Court of the United States affirmed the decree of the state court, "but without prejudice to the right of the railroad company to reopen the case by appropriate proceedings if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

N. P. Ry. Co. vs. State ex rel. McCue, 216 U. S. 579.

Thereupon the defendant adopted and put in force the statute rate and continued so to do for more than one year. On July 1st, 1911, defendant applied to the state court for leave to reopen the case, alleging that after more than one year of trial, following the decision in 216 U. S. 579, it was ready to prove the confiscatory character of the rates provided by said Chapter 51. The state court granted the application. By agreement the pleadings of the former case were adopted as the pleadings in the new case. Testimony was taken covering the period between March 14th, 1910, and June 30, 1911, and duly considered by the state court.

On January 2nd, 1914, the state court rendered its decree granting the state the same relief as in the first case, having made voluminous findings of fact covering the period embraced in the last investigation.

State ex rel. McCue vs. N. P. Ry. Co., 26 N. D. 438; 145 N. W. 135.

Thereupon the defendant, on writ of error again removed the case to the Supreme Court of the United States. On March 8th, 1915, this court reversed the second decree of the state court. This reversal, however, in no way affected, but

left intact the first decree of the state court and the decision of this court affirming it, as aforesaid.

N. P. Ry. Co., ex State ex rel. McCue 236 U. S. 585.

The state Supreme Court, in the case at bar has held that the aforesaid litigation between the State of North Dakota and the defendant and the other railways does not preclude the plaintiff herein from recovering against this defendant for the excess freight charges exacted from plaintiff during the period in question in the complaint; that the prior decisions in this matter, in 19 N. D. 45, and 216 U. S. 579, are, as to the defendant railway company, *res judicata* upon the issue there determined as to the confiscatory or non-confiscatory character of the rates for the period of time involved herein.

C. L. Merrick Company, vs. M., St. P. & S. Ste. M. Ry. Co., 35 N. D. 331; 160 N. W. 140.

Missouri vs. C. B. & Q. Ry. Co., 241 U. S. 533; 36 Sup. Ct. Rep. 715.

There could not here be two lawful rates at the same time. In the construction of rate statute a different principle enters from the construction in ordinary statutes regulating, limiting or defining property rights. Such statutes are usually never held void *ab initio*, but only after an adequate trial of the rates.

Chapter 51 was lawful because *prima facie* valid, and because it was ordered into effect by the courts until facts ascertained during a period of trial under such rates might determine that the rates were in fact confiscatory, or, in other words, until the presumption of validity that followed the

legislative enactment and the decrees of the courts was rebutted.

It must be self evident that when the Supreme Court of the United States, in the first decision on March 14th, 1910, affirmed the first decree of the state court and ordered Chapter 51 into effect, such order related back to the inception of the statute. The defendant, however, contends that by the last decision of this court, in 236 U. S. 585, the plaintiff, by such last decision, is precluded from a recovery upon the ground that such decision of this court, in effect, declared Chapter 51 unconstitutional and void from the date of its passage; and that such last decision reversed and set aside the prior decisions of the state court and of the United States Supreme Court.

As was well said by the learned Chief Justice of North Dakota in this case:

> "If this contention is sound, it inevitably follows that both this (state) and the Supreme Court of the United States, by their first mandates, forced defendant to put into effect unlawful and confiscatory rates during the period from March 14, 1910, and March 8, 1915."

It must be true that the first decision was final in so far as it put the statute into effect; that it is *res judicata* as to the matters therein determined. While it is true the decree permitted the defendant, at some future time, provided it saw fit, to reopen the case, nevertheless the decree actually put Chapter 51 into effect, and it is, of course, apparent and self-evident that in ordering the law into effect it was put into effect from its date.

Missouri ex. C. B. & Q. Ry. Co., 241 U. S. 533; 36 Sup. Ct. Rep. 715.

It seems plain that when defendant applied for and was granted leave to make a new showing as to the confiscatory character of the rates prescribed by Chapter 51, such application amounted in legal effect to the commencement of a new action to determine a new issue for a subsequent period of time. The question of the reasonableness of the rates during the period covered by the first decision of this court had been settled and further inquiry foreclosed as to such period. The new action was to determine the effect of facts arising subsequently to the first decision of this court; and the case was not reopened for the purpose of again trying the issues formerly decided. Nothing in the last decision of this court in any way affects the issues decided and disposed of in the first decision or the decree therein entered.

C. L. Merrick Co., ex. M. St. P. & S. Ste. M. Ry. Co., 35 N. D. 331; 160 N. W. 140.

Missouri ex. C. B. & Q. Ry. Co., 241 U. S. 533; 36 Sup. Ct. Rep. 715.

Under Section 142 of the Constitution of the State of North Dakota the rate fixed by the legislature shall remain in force pending the decision of the courts.

The rates in question herein were fixed by the legislature under the North Dakota constitutional provison heretofore quoted. The validity of Section 142 of the Constitution of North Dakota was not involved nor passed upon in the coal rate cases.

Counsel for defendant construes Section 142 to mean that,

while it keeps in force the statute rate during the litigation and pending the decision of the courts, after such final decision the question of the actual rate to be paid must be adjusted in accordance with the final decision of the courts; that is to say, that if the final decisions of the courts shall hold the statute rate confiscatory, then the carrier may recover of the shipper such higher rate as, under the circumstances, might be a reasonable rate. Our construction of this provision of the constitution is that it recognizes the well known principle, often applied by this court in rate cases, that a legislative rate is prima facie valid and reasonable and becomes the lawful rate until adjudged void by the courts, and that a rate statute will not be void until after a reasonable trial thereof. It means nothing more than that the common carrier must, pending his appeal to the courts, put in force the statute rate, or in other words that until interfered with by the courts it shall be the lawful rate.

We do not agree with counsel that this constitutional provision requires the carrier under all circumstances to keep in force the statute rate until a final decision of the courts which, as counsel has pointed out, might mean a period of several years of litigation. The language, "but the rates fixed by the legislative assembly or board of railway commissioners shall remain in force pending the decision of the courts," we think means any decision of any court of competent jurisdiction with reference to the statute rate. It may be, and frequently is, an interlocutory order or decree of a court temporarily restraining the enforcement of a statute rate, or it may be a decision on the merits. We construe the

language, "decision of the courts" as including an order or decree. This construction was recognized both by the defendant herein and this court in the first case of Northern Pacific Railway Co., vs. State ex rel. McCue, when this defendant, after the Supreme Court of the State of North Dakota had sustained the application of the attorney general, applied to this court for and was granted a stay of execution with leave to file a supersedeas bond indemnifying the shippers and staying the execution of the judgment of the state court pending the decision of this court on final hearing.

Upon the whole record we respectfully pray that the judgment of the Supreme Court of the State of North Dakota be in all things affirmed.

Respectfully submitted,

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Attorneys for Defendant in Error.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY *v.* C. L. MERRICK COMPANY.

ERROR TO THE DISTRICT COURT, SIXTH JUDICIAL DISTRICT, OF THE STATE OF NORTH DAKOTA.

No. 15. Argued January 29, 1920.—Decided December 20, 1920.

A decree of this court affirming "without prejudice" an injunctive decree of a state court upholding a statutory railroad rate against a charge of confiscation, determines the adequacy of the rate for the period antedating the decree, and is not superseded by a decree in a subsequent suit holding the rate confiscatory upon new evidence developed by a further test. P. 377.

A federal question which has been specifically settled and is no longer an open one in this court, is not an adequate basis for a writ of error. *Id.*

Writ of error to review 35 N. Dak. 331, dismissed.

THE case is stated in the opinion.

Mr. John L. Erdall, with whom *Mr. A. H. Bright* and *Mr. H. B. Dike* were on the brief, for plaintiff in error.

Mr. Alfred Zuger and *Mr. Andrew Miller*, with whom *Mr. B. F. Tillotson* was on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a companion case to *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.* v. *Washburn Lignite Coal Co.*, just decided, *ante*, 370, and was brought by a shipper to recover charges exacted in excess of the statutory rate. The shipments were made prior to the first judgment in the injunction suit, when the carrier was refusing to give effect to the schedule; and the excess was paid under pro-

test and because the carrier would not deliver the coal on payment of the statutory rate. In the trial court there was a judgment against the shipper, and this was reversed by the Supreme Court with a direction to award the shipper the amount claimed. 35 N. Dak. 331. The carrier prosecutes this writ of error.

The pleadings, the opinion of the Supreme Court, and the briefs in this court, show that the only controversy in that court was over the meaning and effect of the first judgment in the injunction suit as affirmed by this court "without prejudice," etc. On the part of the shipper it was insisted that that judgment finally and conclusively determined the validity of the statutory rate in respect of the period preceding its rendition; and on the part of the carrier it was insisted that the judgment was interlocutory merely and was entirely superseded and held for naught by the subsequent judgment of this court in the later proceeding. The court sustained the shipper's contention and rejected that of the carrier, saying:

"The fallacy in respondent's [carrier's] contention, as we view it, lies in the unwarranted assumption that the latter judgment relates back and supersedes the first. When respondent [carrier] applied for and was granted leave to make a new showing as to the confiscatory character of the statutory rates, it amounted in legal effect to the commencement of a new action to determine a new issue; to-wit, whether as applied to and in the light of facts *subsequently arising*, such statutory rates are confiscatory. The case was not reopened for the purpose of relitigating the issues formerly decided, nor was the former decree in any way affected. This is made clear by the recent decision of the Supreme Court in *Missouri* v. *Chicago, B. & Q. R. Co.*, 241 U. S. 533."

In support of that view the court quoted portions of the opinion in the case cited, including the following:

"In a rate case where an assertion of confiscation was

not upheld because of the weakness of the facts supporting it, the practice came to be that the decree rejecting the claim and giving effect to the statute was, where it was deemed the situation justified it, qualified as 'without prejudice,' not to leave open the controversy as to the period with which the decree dealt, and which it concluded, but in order not to prejudice rights of property in the future if from future operation and changed conditions arising in such future it resulted that there was confiscation. And the same limitation arising from a solicitude not to unduly restrain in the future the operation of the law came to be applied where the asserted confiscation was held to be established. In other words, the decree enjoining the enforcement of the statute in that case was also qualified as without prejudice to the enforcement of the statute in the future if a change in conditions arose. . . . A complete illustration of the operation of the qualification is afforded by the *North Dakota Case*, just cited [216 U. S. 579], since in that case as a result of the qualification 'without prejudice' the case was subsequently reopened and upon a consideration of new conditions arising in such future period, a different result followed [236 U. S. 585] from that which had been previously reached."

When we have in mind the question which the Supreme Court was called on to decide, and did decide, and the fact that the question was no longer an open one in this court, as is shown by our opinion in the *Missouri Case*, it is apparent that this writ of error is without any adequate basis.

Writ of error dismissed.